IN QUEST OF EQUALITY:
INDIAN CONSTITUTION SINCE INDEPENDENCE

~ BOJJA THARAKAM

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We would like to thank

Dr Bojja Viziabharathi for being the steady inspiration for this effort.

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Table of Contents

About the book vi

Prelude viii

Interlude: The Making of the Constitution of India x

The Constituent Assembly 1

The Concept of the Constitution 8

Enter the Constitution 15

Fundamental Rights 22

Right to Travel and Personal Liberty 53

Approaching the Supreme Court 67

Directive Principles 75

Centre and State Relations 92

The Judiciary 105

Amendment of the Constitution 119

The Neglected Citizens 131

The Missing People of India 138

Cases Cited 151

References 161

About the book

"The performance of the Constitution is not only visible in the Central Hall of the Parliament, or in the Durbar Hall of the Rashtrapati Bhavan, or under the high dome of the Supreme Court of India, or in the cosy corridors of the Central Secretariat or in the metropolitan mega-structures, or in the skyscrapers, or in lush luxurious lawns, factories and business houses, heavy machines and containers, but also visible in the villages, parched lands, bastis, streets, slums, mohallas, jhuggi-jhopdis, cheris, ghettos, fields, brick kilns, mines, tea plantations, educational institutions, police stations, jails, hospitals, pavements, red light areas, and dark dingy hell holes of towns and cities."

This is the perspective from which the author works. He is firmly positioned on the margins, and beyond, of Indian society when he takes a very lucid, and critical, look at the functioning of the Indian constitution since independence.

The symbolism displayed by the unknown Bahujan, the working classes who have installed statues of Babasaheb holding the book of Constitution centers squarely on their quest for equality. The statue and the book appear in narrow streets, little alcoves, town squares, in slums and in the center of large cosmopolitan cities. This visual claim on the public sphere by ordinary people is the most direct exposition of an unequal society and their indomitable spirit to correct it. It is no surprise that this book comes from a pioneering thinker-activist like Bojja Tharakam whose entire life was spent in fighting for rights of the marginalized. Who else could have evaluated the complete pedagogic erasure of the making of the Constitution and present a solution in the form of this lucid rendering of the history, the moral, social, political

and legal underpinnings of the Constitution?

This book offers us a glimpse of Bojja Tharakam's formidable intellect, and his commitment to the cause of the Dalits and all marginalized. It is quite in line with his earlier writings in Telugu and English, like: Kulam-Vargam (Caste-Class, 1996), Nadiputtina Gonthuka (The Voice That Gave Birth to the River,1983), Nalage Godavari (The Godavari is Like Me, 2000) and Panchatantram (2012), his special tracts Nela-Nagali-Mudeddulu (Land, Plough and Three Oxen, 2008), Dalitulu-Rajyam (Dalits and the State, 2008), Constitution and the Coup d'etat (2000) etc.,

All these texts, along with the current one, illustrate Tharakam's ideological moorings and his empirical knowledge gained from over five decades of political and social activism.

The profound impact his activism has had on his literary endeavours is evident throughout his works. As a pioneering champion of human rights in India (a founder Vice President of Andhra Pradesh Civil Liberties Committee), as a consistent advocate of Dalit rights (as a founder of the Dalita Maha Sabha), as an organiser of protest movements (leading struggles, from Karamchedu to Laximpeta), as a leader (of the Republican Party of India in Andhra Pradesh) and a writer, poet: he combined many skills and capacities dedicated to transform the exploitative caste system. All these experiences illumine his writings, and his uniquely grounded intellectual personality.

His was an illustrious life, from his twenties onwards he was invested in finding ways to make the systems respond to the humanity of the marginalized. He belonged to a generation where Ambedkar and Gandhi loomed large in their everyday. The politics, strategies, and value systems that these men pushed forward were examined, evaluated, absorbed and or discarded by his generation. This short book written as a comparative note on the two marches, Mahad and Dandi, draws on the influences of these two men, the political contexts and their relevance, then and now.

~ Anu Ramdas & Naren Bedide (Kuffir)

Prelude

On 26th November, 1949, the Constitution of India was adopted by the Constituent Assembly established specifically for the purpose of making a constitution for an independent India. On that day, the Preamble and certain Articles of the Constitution came into operation and the rest of the Constitution followed on 26th January, 1950. Though the Constituent Assembly started its first session in British India, under the suzerainty of a foreign government, its adoption and implementation began in an independent country. On 15th August, 1947, the country attained independence and on 26th January, 1950, it became a republic.

The completion of a certain mature age in life has a cultural significance in India. In a man's life, it is considered to be its fulfillment—everything one can achieve, should be achieved by the time one reaches a ripe age. The completion of such an age is an event celebrated in many communities. Such an event has arrived for the Constitution. At such a moment, it may be in the fitness of things to take a look into the functioning of the Constitution.

But for a country which boasts of a codified history of 2500 years, if not a chronicled history of 3000 years, or sculptured indices of more than 5000 years, if not an oral history beyond 5000 years, the period of one human life appears to be too little, like a drop in the ocean; but, for people who are subjected to oppression and suppression, condemned to a life of squalor and servitude, conscripted into abject poverty, misery and surrender, this period of 6-7 decades is too long a wait. For people who are driven miles apart from the splendour of civilization, leave alone from the fringes of power, waiting for redemption and freedom from hunger and want, it is a periodthat is too long to bear.

For the very same "We the people of India" who gave unto themselves a Constitution glowing with promises of justice—social, economic and political, the situation appears to be not moving an inch forward towards the tantalizing objective of 'Equality'. In fact, it is drifting away from it

inch by inch from year to year. Six, seven decades of delay for such people is too arduous and intolerable. Since the Constitution of India made promises of social, economic and political equality, guaranteed liberty and assured freedom, it is nothing but natural for the people to wait in expectation of the performance of the Constitution in its fulfillment of its lofty goals. Equality should encompass all. It is not just a level playing exercise, it brings forth the essence of democracy in an effort to humanize people. Here is an attempt to look into the sojourn of the Constitution during these eventful post-independence years.

Before embarking on this exercise of assessing the functioning of the Constitution, it is apt to recollect the most eloquent words of K.R. Narayanan, former President of India, who was the Head of the State, on the occasion of the Golden Jubilee of the Constitution of India in the year 2000:

"Today when there is so much talk about revising the Constitution or even writing a new Constitution, we have to consider *whether it is the Constitution that has failed us or whether it is we who have failed the Constitution*". (italics supplied) (Narayanan, 2000, p. 14). This poignant question posed by the President of India is yet to be answered. Concluding, then President warned the nation, "Whatever we may do, and we have a right to bring about necessary changes in the political and economic system, we should ensure that the basic philosophy behind the Constitution and fundamental socio-economic soul of the Constitution remains sacrosanct" (Narayanan, 2000, p. 15.) This book is an attempt to see whether or not the Nation took up the challenge thrown by its President and kept the assurance of upholding the fundamental socio-economic soul of the Constitution as sacrosanct.

Interlude: The Making of the Constitution of India

The making of the Constitution of India is as perplexing as the evolution of the people of India. Though the Constitution was prepared, debated, discussed, approved and adopted by Indians, this process was initiated by an alien government. We have heard that territories and areas of land were annexed by invasions by plunderers, thugs, *Pindaries*, marauders, dacoits, gun-toting and horse-riding goons and the like who established their kingdoms and fiefdoms; but we have not heard, anywhere in the world, of a handful of merchants forming themselves into a trading company, entering another land for the purpose of commerce, establishing places of business, constructing forts and ports with the permission of the local kings, tempting them with foreign goods, bribing them, purchasing them and through treacherous and fraudulent means overthrowing them, annexing their territories, and finally, establishing an empire, subjugating millions of people, looting all their riches and glory. This happened only in India under the name and style of the 'East India Company'. This Company was incorporated in England in the year 1600. Different societies claiming monopoly on the East India trade united together in one single company in the year 1702 and continued their activity. Two thousand persons possessing stock, having no other interest in India except to be paid their dividends out of Indian revenue, would elect 24 Directors. These Directors would elect a President. These Directors, the Board of Control, and its President were assisted by a large staff of irresponsible Secretaries, Examiners and clerks at the India House (located at Leadenhall Street, London). According to Marx (1979) "We have thus a Corporation ruling over an immense empire not formed, as in Venice, by eminent patricians, but by old, obstinate clerks and the like odd fellows" (p. 183).

This infamous East India Company ruled a very large part of India for almost 200 years. According to M.V. Pylee, the transformation of East India Company from a commercial concern to a territorial power began with Clive in 1757 and extended over a period of a century, culminating

under Canning, the successor of Dalhousie, in the establishment of a mighty British Empire, unrivalled in authority and unparalleled in history, embracing the entire Indian subcontinent.

After the Indian Revolt of 1857, the 'Act for the Better Government of India' of 1858 declaring that India was to be governed by and in the name of the English Crown, authorized the appointment of an Additional Principal Secretary of State (for India) and created the Council of India. After this came the Proclamation of Queen Victoria of 1858 bringing the rule of the East India Company to an end. According to Cornewall Lewis (1858), a member of the House of Commons, "No civilized Government existed on this earth, which was more corrupt, more perfidious and more rapacious than the Government of the East India Company from 1765 to 1784". Thereafter, the Indian administration was brought under the Governor General in Council. A century later, almost, on the basis of a report of a Committee headed by John Simon, which was boycotted by several political parties in India, the British Parliament made and introduced the Government of India Act, 1935.

The Second World War quickened the process of self-governance for Indians. Just before the dispatch of the Cabinet delegates to India, Earl Attlee (1946), the Prime Minister of Britain, declared: "My colleagues are going to India with the intention of using their utmost endeavours to help her to attain her freedom as speedily as possible. What form of Government is to replace the present regime is for India to decide; but our desire is to help her to set up forthwith the machinery for making that discussion". As per the British Prime Minister's statement in the House of Commons on February 20, 1947, it had been the policy of successive British Governments to work towards the realization of self-government in India.... In the constitutional field, the Acts of 1919 and 1935 passed by the British Parliament—each represented a substantial transfer of political power. His Majesty's government's desire to handover their responsibilities to authorities established by a Constitution was approved by all parties in India in accordance with the Cabinet Mission Plan. After the end of the 2nd World War, Lord Wavell, the Viceroy of India, on his return from England where he had had detailed discussions with the British Cabinet (Labour), announced that following the elections, a Constitution making body would be set up.

The Cabinet Mission recommended a plan and released it on 16th May, 1946. The main features of the Plan were: (1) the Constitution

making body should be constituted immediately through indirect election. For this purpose, each province was to be allotted a number of seats, proportionate to its population, roughly in the ratio of one to a million. The total number of seats thus arrived at for each province was to be divided among the main communities in proportion to their population and that the representatives allotted to each community were to be elected by the members of the same community in the Legislative Assembly; (2) another feature was that the representatives so elected would meet together with the representatives of the Indian States to constitute a Constitution making body. Accordingly, elections to the proposed Constituent Assembly were completed by 16th August, 1946 in all the provinces. On 2nd September, 1946, a fully popular Governor General's Council was constituted and took over the governance of the country. Jawaharlal Nehru was its first Vice President.

The Constituent Assembly thus formed, met for the first time on December 9, 1946. The Muslim League representatives boycotted it. On 20 February, 1947, Prime Minister Attlee made a statement in the House of Commons announcing the British Government's definite intention of taking necessary steps to effect the peaceful transfer of power to responsible Indian hands by a date not later than June, 1948. The Indian Independence Bill, designed to transfer power to the people of India, was introduced in the House of Commons on July 4, 1947 and was piloted through Parliament in a record time and received the Royal assent on July 18, 1947. Thereafter, the Indian Independence Act, 1947 was promulgated. One of the main provisions of the Act was:as from 15th August, 1947, two independent dominions shall be set up in India to be known respectively as India and Pakistan. Another provision says that the Constituent Assembly of each Dominion shall exercise all powers exercised by the Legislature of the Dominion. Thus, the Constituent Assembly fulfilled two functions, one: making the Constitution, and two: performing legislative work for the country. Thus, we inherited the administrative legacy of the East India Company and the British Government.

The Constituent Assembly

On 2 September, 1946, the first popular government took charge of the administration of India, but under the aegis of a Governor General appointed by the Crown of England. According to B.N. Rau, in regard to the strength of the Constituent Assembly, the original Cripps Plan of 1942 had visualized a membership of 200. Jawaharlal Nehru did not consider it adequate: he thought that it might, with advantage, consist of 300 or even 400 members.

Regarding the beginning of the functioning of the Constituent Assembly, Dr. Rajendra Prasad, the President of the Constituent Assembly, made a statement of facts. Out of a total of 296 members who were to take part in the preliminary session, 210 members attended. These members consisted of 155 Hindus out of a total of 160, 30 Scheduled Caste representatives out of a total of 33, all the five Sikhs, 5 Indian Christians out of a total of 7, all the 5 representatives of Backward Tribes, all 3 Anglo – Indians, all 3 Parsis and 4 Muslims out of 80. The significant absence was, of course, that of the Muslim League. This was in response to certain remarks made by Churchill in the House of Commons regarding the composition of the Constituent Assembly, that it represented "only one major community in India".

The Constituent Assembly while assuming power to govern the country, made a resolution to that effect, after a pledge had been taken by all members present on the stroke of 12:00 midnight on 14 August, 1947.

The first meeting of the Constituent Assembly of India took place in the Constitution Hall, New Delhi, on 9 December, 1946. In total, 207 members presented their credentials. The Assembly elected Dr. Sachidananda Sinha from Bihar as its temporary Chairman. Later, the Constituent Assembly elected Dr. Rajendra Prasad as its President, and he presided over the Assembly till its last session on 24th January, 1950. B.N. Rau was appointed as Constitutional Adviser.

According to Dr. B.R. Ambedkar, the Chairman of the Drafting Committee of the Constitution of India, the term of the Constituent Assembly till a day prior to the adoption of the Constitution on 26th November, 1949, amounted to two years eleven months and seventeen days since it first met on 9th December, 1946. During this period, the Constituent Assembly had held eleven sessions in total, which consumed 165 days. Out of these, the Assembly spent 114 days for the consideration of the Draft Constitution. Originally, the Constitutional Adviser Mr. B.N. Rau, prepared a draft, and later the Constituent Assembly appointed a Drafting Committee on 29th August, 1947 to which Dr. Ambedkar was elected as Chairman. The Committee prepared a Draft, which the Assembly discussed at length, considered, amended and approved. The Drafting Committee held its first meeting on 30th August and since then, it sat for 141 days during which it was engaged in the preparation of the Draft Constitution. The Draft Constitution, as prepared by the Constitutional Adviser as a text for the Drafting Committee to work upon, consisted of 243 Articles and 13 Schedules. The first Draft Constitution, as presented by the Drafting Committee to the Constituent Assembly, contained 315 Articles and 8 Schedules. At the end of the stage of consideration, the number of Articles in the Draft Constitution increased to 386. In its final form, the Draft Constitution contained 395 Articles and 8 Schedules. The total number of amendments to the Draft Constitution tabled was approximately 7,635. Of them, the total number of amendments actually moved in the House was 2,473, a great majority of which were rejected. It was discovered that not less than 53,000 visitors were admitted to the visitors' gallery during the period when the Constitution had been under consideration. A debate also went on in the media and among several people having interest in the constitution.

At one stage, it was said that the Assembly had taken too long a time to finish its work, that it was going on at a leisurely pace and wasting public money. In response to this allegation, Dr. Ambedkar provided some details about the making of Constitutions in several countries. The American Constitution was made within four months. The Constitution of Canada took a period of two years and five months. The Australian Constitution consumed nine years. The South African Constitution took one year for completion. The Constitutions of America, Canada, South Africa and Australia are much smaller than the Constitution of India. The makers of the Constitutions of America, Canada, Australia and South Africa did not have to face the problem of amendments. They

were passed as moved. On the other hand, the Constituent Assembly in India had to deal with as many as 2,473 amendments. Another reason for the delay maybe the terms of reference of the Constituent Assembly, which enjoined it complete the work of Constitution-making, which commenced on 9th December, 1946 and (ii) function as the Dominion Legislature until a Legislature under the new Constitution comes into being.

The Committee to scrutinize the Draft Constitution consisting of 7 members did a laudable job, but ultimately, the whole work turned out to be borne by Dr. Ambedkar, assisted by Mukherji. Paying great tributes to Dr. Ambedkar for his commendable job in producing and giving a final shape to the Constitution, Dr. B. Pattabhi Sitaramayya, said in the Constituent Assembly: "When all is said and done, we must realize how much we owe to the half a dozen men that have fashioned this Constitution and given it a shape and form. Our friend, Dr. Ambedkar, has gone away, else I should have liked to tell him what a steam-roller intellect he brought to bear upon this magnificent and tremendous task: irresistible, indomitable, unconquerable, levelling down tall palms and short poppies; whatever he felt to be right he stood by regardless of consequences" (CAD 1949-11-25, 11.165.184). Sir Alladi Krishna Swamy Ayyar, echoed similar sentiments while closing his speech in the concluding session: "Before I conclude, I would be failing in my duty if I do not express my high appreciation of the skill and ability with which my friend the Hon'ble Dr. Ambedkar has piloted this Constitution and his untiring work as the Chairman of the Drafting Committee" (CAD 1949-11-23, 11.163.82).

Finally, the President of the Constituent Assembly said: "... Sitting in the Chair and watching the proceedings from day to day, I have realized as nobody else could have, with what zeal and devotion the Members of the Drafting Committee and especially its Chairman Dr. Ambedkar, inspite of his indifferent health, have worked. We could never make a decision which was or could be ever so right as when we put him on the Drafting Committee and made him as its Chairman. He has not only justified his selection but has added lustre to the work which he has done" (CAD 1949-11-26, 11.166.50). Then, the President of the Constituent Assembly moved a motion "that the Constitution as settled by the Assembly be passed", and the Constitution, as moved by Dr. Ambedkar, was adopted amidst prolonged cheers. Thus the Constitution of India was authenticated by the signature of all the members and the

President, and received authority to come into force immediately. Thus the Constitution of India came into force on 26th November, 1949.

Reflections on the Constituent Assembly

While introducing the Draft Constitution as settled by the Drafting Committee, its Chairman Dr. Ambedkar said: "... A student of Constitutional Law if a copy of a Constitution is placed in his hands is sure to ask two questions. Firstly, what is the form of Government that is envisaged in the Constitution; and secondly, what is the form of the Constitution?" (CAD 1948-11-04, 7.48.197) The answer given by Dr. Ambedkar to the first question is "What the Draft Constitution proposes is the Parliamentary System" This is different from the Presidential System. We will later observe that the Constitution of India is a blend of both the systems: the Parliamentary and the Presidential. According to Dr. Ambedkar, the Drafting Committee in recommending the Parliamentary System of Executive, preferred more responsibility to more stability. He also felt that: "the Constitution as settled by the Drafting Committee is good enough to make in this country a start with". He felt "it is workable, it is flexible and it is strong enough to hold the country together both in peacetime and in wartime."

Holding out a caution, he finally said: "... Indeed, if I may say so, if things go wrong under the new Constitution, the reason will not be that we had a bad Constitution. What we will have to say is that man was vile..." With these words, Dr. Ambedkar moved the Draft for consideration of the Constituent Assembly. A marathon debate went on for more than 114 days. Participating in the debate Sri T. T. Krishnamachari, appreciating the amount of work and enthusiasm that Dr. Ambedkar had brought to bear on the work of drafting this Constitution informed the Assembly that "The House is perhaps aware that of the seven members nominated by you, one had resigned from the House and was replaced. One died and was not replaced. One was away in America and his place was not filled up, and another person was engaged in State Affairs and there was a void to that extent. One or two people are far away from Delhi and perhaps reasons of health did not permit them to attend. So it happened ultimately that the burden of drafting this Constitution fell on Dr. Ambedkar and I have no doubt that we are grateful to him for having achieved this task in a manner which is undoubtedly commendable." (CAD 1948-11-05, 7.49.107).

About the functioning of the Constitution, Dr. Ambedkar, while replying to the great debate, said: "however good a Constitution may be it is sure to turn out bad because those who are called to work it, happen to be a bad lot. However bad a Constitution may be, it may turn out to be good if those who are called to work it, happen to be a good lot. The working of a Constitution does not depend wholly upon the nature of the Constitution. The Constitution can provide only the organs of the State, such as the Legislature, the Executive and the Judiciary. The factors on which the working of those organs of the State depend are the people and the political parties they will set up as their instruments to carry out their wishes and their politics. Who can say how the people of India and their parties will behave? Will they uphold Constitutional methods of achieving their purposes or will they prefer revolutionary methods of achieving them? If they adopt the revolutionary methods, however good the Constitution maybe, it requires no prophet to say that it will fail. It is, therefore, futile to pass any judgment upon the Constitution without reference to the part which the people and their parties are likely to play" (CAD 1949-11-25, 11.165.309).

Ultimately it is the people and the political parties who are responsible either for the success or the failure of the Constitution. It also depends upon the people who manage the three organs of the State viz., the Legislature, the Executive and the Judiciary, either to supplement it or to subvert it. He proceeds further that "on the 26th January, 1950, India would be a democratic country in the sense that India, from that day, would have a government of the people, by the people and for the people." He contemplates as to "...what would happen to her democratic Constitution." He suggests a way to preserve and maintain democracy: "If we wish to maintain democracy not merely in form, but also in fact, what must we do? The first thing in my judgment we must do is to hold fast to Constitutional methods of achieving our social and economic objectives. The second thing we must do is to observe the caution which John Stuart Mill has given to all who are interested in the maintenance of democracy namely 'not to lay their liberties at the feet of even a great man or to trust him with powers which enable him to subvert their institutions'. The third thing we must do is not to be content with mere political democracy. We must make our political democracy a social democracy as well...."

This book is an attempt to answer several related questions: whether we have acted in line with his wishes during all these years while upholding

the Constitution, more particularly whether we have maintained democracy? Whether we held fast to the constitutional methods of achieving our social and economic objectives? Whether we have not laid our liberties at the feet of even a great man or woman? And lastly, whether we have made our political democracy a social democracy? We have to question ourselves whether our sojourn is towards political, social and economic democracy or towards its opposite direction or towards any other direction?

Dr. Ambedkar further asked us to "begin by acknowledging the fact that there is complete absence of two things in Indian Society. One of these is equality. On the social plane, we have in India a society based on the principles of graded inequality which means elevation for some and degradation for others. On the economic plane, we have a society in which there are some who have immense wealth as against many who live in abject poverty..."

The President of the Constituent Assembly, who later became the first President of Indian Republic, also echoed similar sentiments:

"Whatever the Constitution may or may not provide the welfare of the country will depend upon the way in which the country is administered by it. It is trite to say that a country can have only the Government it deserves. If the people who are elected are capable and men of character and integrity, they would be able to make the best even of a defective Constitution. If they are lacking in these, the Constitution cannot help the country. After all, a Constitution, like a machine, is a lifeless thing. It acquires life because of the men who control it and operate it and India needs today nothing more than a set of honest men who will have the interest of the country before them. There is a fissiparous tendency arising out of various elements in our life. We have communal differences, caste differences, language differences, provincial differences and so forth. It requires men of strong character, men of vision, men who will not sacrifice the interest of the country at large for the sake of smaller groups and areas and who will rise over the prejudices which are born of these differences. We can only hope that the country will throw up such men in abundance.." (CAD 1949-11-26, 11.166.48).

Now it is the time to search within ourselves whether the country has thrown up men of character and vision and whether we have placed the reins of administration and governance of this country in the safe

hands of men and women of character. We have also to answer whether these post-independence years were not sufficient to evolve as men and women of character and vision. Both the President of the Constituent Assembly and the chief Architect of the Constitution handed over to us not only cautionary advice but also prophetic warnings in this regard.

The Constitution of India is given its name in Article 393 of the Constitution as adopted by the Constituent Assembly. Article 394 indicates its commencement. The commencement Article i.e. Article 394 and Articles 5,6,7,8,9,60, 324, 366, 367, 379, 380, 388, 391, 392 and 393 came into force immediately and the remaining provisions of this Constitution came into force on the twenty-sixth day of January, 1950, which day is referred to in this Constitution as the commencement of this Constitution 26th January, 1950, which happened to be the twentieth anniversary of the day on which the Indian National Congress adopted the resolution on 'Poorna Swaraj' (complete political independence)—and which has ever since become the Republic Day of India.

The Concept of the Constitution

The members of the Constituent Assembly, also playing the role of members of the independent Indian Legislature, framed and adopted the Constitution. But, surprisingly, they could not give a single name to this country. The members suggested several names like Bharat, Hindustan, Hind, Bharatbhumi or Bharat-varsha and Bharati. Rejecting several amendments, ultimately, the expression 'India that is Bharat' was adopted and incorporated in Article 1 of the Constitution. It is very strange now to think that even at the time of naming the country the Members were ambivalent. Nowhere in the world does a country have two names in a single phrase. They have either the names given by their original inhabitants or were forced to adopt the names given by their subsequent conquerors. But as soon as they drove out the alien rulers, they got back to their original name/s in their language/s. Probably, since India is not a single nation but a collective of territories, a single name could not be given. Since India is a conglomeration of several small countries or kingdoms, princely states or *samsthanas*, no single name could be settled on. Finally, they settled on the name 'India that is Bharat'. It still reminds Indians that they should evolve themselves into a single nation, irrespective of their different languages, traits, customs or cultures. We do not find any traces of this evolution during the post-independence years. On the other hand, fissiparous trends sometimes raise their head.

The Constitution of India is unique also in another sense, as it not only provides the necessary rules and regulations for the governance of the country, but it also assures equality, liberty and fraternity to its millions, holds out certain promises, hands over certain directives necessary for its governance, restores certain rights, demands certain duties from the citizens and finally looks at 'we the people', expecting action from them for the realization of the dreams formulated in the pages of the treatise. Stopping a while at this moment, we should look at ourselves to think about what happened to those promises and plans, how far we have traversed towards the realization of its goals and how far away we are from reaching its destination. It is also time for us to examine

whether we are implementing the Constitution or impeding it, whether we are developing it or destroying it, magnifying it or mutilating it, and whether we have made it beneficial or maleficial.

The performance of the Constitution is not only visible in the Central Hall of the Parliament, or in the Durbar Hall of the Rashtrapati Bhavan, or under the high dome of the Supreme Court of India, or in the cosy corridors of the Central Secretariat or in the metropolitan mega-structures, or in the skyscrapers, or in lush luxurious lawns, factories and business houses, heavy machines and containers, but also visible in the villages, parched lands, bastis, streets, slums, mohallas, jhuggi-jhopdis, cheris, ghettos, fields, brick kilns, mines, tea plantations, educational institutions, police stations, jails, hospitals, pavements, red light areas, and dark dingy hell holes of towns and cities. The Constitution is not only visible on pot bellies, imported cars, electronic appliances, gadgets, computers, televisions, fridges, soft and hot drinks, but also visible on empty stomachs, half starved children picking up rags and searching the dust bins in the street corners for food, and half clad men and women, broken pots, tin sheds, thatched houses, stinking drains, infected habitations, unprotected tribes, destitutes, beggars and untouchables. When we look at the Constitution, several questions emerge, and like its chief architect, it always raises its cautioning finger and stares at us asking: what happened to its promises, programmes and plans. Unlike other Constitutions, the Constitution of India demands performance since it has charted a course of action for the people to adopt and follow through.

It is an enigma as to why the British Government asked Indians to frame a Constitution, when the British themselves do not possess a Constitution. The Crown, after taking over the full reins of the territory called India, more particularly British India, was promulgating from time to time legislations to govern the people under its suzerainty. The last important and detailed statutes were (i) the Government of India Act 1919 and (ii) the Government of India Act, 1935. The second was the most crucial statute since it not only provided for the entire governance of the people, distribution of powers between its various wings, but also division of powers between the Centre and the provinces (later in the Constitution of India termed as States), demarcating various functions of the Legislature, the Executive and the Judiciary and fixing its bounds and reaches and the like. The draft of the Constitution of India was mostly modelled on this Act in the aspect of administration. Important features

of the Act of 1935 were redrafted because they were put into practice successfully from its enactment and all the three wings were functioning in coordination, allowing the transfer of power from the British to Indians smoothly. Keeping aside the details of the Constitution, the original contribution of the Constitution makers is its essence and spirit. The Members of the Constituent Assembly improved the Draft prepared by the Constitutional Adviser. The Drafting Committee improved upon the text handed to it after thorough discussion and deliberation, and finally the Chairman of the Drafting Committee chiseled and sculpted it, infusing blood into its veins and sinews. The Constitution of India is not just a collection of cold words or stale sentences or frigid phrases, but a vibrant and throbbing creature holding aloft the motto of 'equality, liberty and fraternity'.

According to John Major (1996), "The British Constitution is vibrant and robust. But it is not indestructible. People must realize that our Constitution is not a piece of architecture that one can re-engineer by knocking down a wall here or adding an extension there. It is a living, breathing Constitution. It embodies a set of values, a legacy of understandings that has developed year by year over the centuries. No one should lightly contemplate tampering with an institution that is so ancient and yet so alive."

These sentiments probably may be true with relation to the British Constitutional law since it is unwritten. The same may not be true in relation to the Constitution of India. It is susceptible to change, indeed it has provided an inbuilt mechanism to effect changes by way of amendment. It is capable of being tinkered with, of expansion, also of contraction. But the Supreme Court of India finally dealt a heavy blow to those who tried to tamper with it by prescribing that "the basic structure of the Constitution cannot be changed". Despite the caution and prohibition, the Bharatiya Janata Party (BJP), which assumed power in the year 1999, contemplated replacing the Constitution with a new document which reflects its social, economic and political philosophy, and in fact, appointed a Committee for that purpose, headed by a former Chief Justice of India, M. N. Venkatachaliah. However, bowing down to public opposition to this move, the BJP finally limited the scope of the Committee to scrutinizing the functioning of the Constitution.

Constitutions in other countries

Even the unwritten constitution of Britain was encapsulated in a written form as the ' Magna Carta' 800 years ago and as the ' Bill of Rights' (another name for fundamental rights) in the year 1688. Jan-Erik Lane (1996) very succinctly described the Constitution as "... first and foremost a constitution is a compact document that comprises a number of articles about the State, laying down Rules which State activists are supposed to follow" (p. 5). He further says "...Constitutions are either written documents comprising a set of Rules about the State, or real life institutions that regulate how political power is exercised within the public sector and how individual persons and governments interact. In both the literal and real interpretation of the concept of a Constitution, the key element appears to be the rule or the set of Rules as it were. Constitutions typically contain written Rules that are supposed to govern the creation and maintenance of institutions..." (Lane, 1996, p. 136). He further adds "... the real constitution is the set of actually operating institutions that regulate State power and the relationship between government and citizens..." (Lane, 1996, p. 199)

The Constitution of the United States of America is another model for the Constitution of India. About the same, Stephen M. Griffin (1998) says: "The constitution is apparently revered but it is not celebrated. It is at once part of American history and a timeless ideal seemingly outside the flow of political events and social change. During the bicentennial year, for example, Constitutional scholar Walter Berns stated that 'the remarkable thing about the Constitution is how little it has had to be changed or for that matter adopted" (p. 9). In response, historian Gordon Wood observed that the Constitution, like other political institutions was the product of 'incremental development through time' and that 'The President's Cabinet, the independent regulatory agencies, the structure and practices of political parties, the practice of judicial review, indeed, most of the means by which we carry on our Governmental business are all unmentioned in the Constitution and are the products of historical experiences....' (Wood,1988 as cited in Griffin, 1998, p. 10). This part of historical experiences from both Britain and America were fashioned into the fabric of the Constitution of India. That is why we find certain similarities in the three Constitutions.

About the reverence that all Constitutions should command "...Madison noted that the Constitution would benefit from 'that veneration which

time bestows on everything', and that this veneration would enhance the stability of the Government" (Griffin, 1998, p. 30). Referring to other constitutions, Eric Berndt said that "Constitutions are drawn up to establish the fundamental principles of a new system of Government subsequent to a revolution. That was the case with the first French Constitution in 1791. Recent examples are the modern constitutions of Portugal adopted in 1974, and of Spain adopted in 1978, which signaled the transition of those countries from fascist regimes to liberal parliamentary democracies. Something similar has happened in South Africa where the changes from a white supremacist regime to a genuinely multi-racial society has been followed by the promulgation of a Constitution with a comprehensive Bill of Rights. Thirdly, after the Second World War, Germany, Italy and Japan all adopted new Constitutions in order to make a fresh start following their defeat and experience of totalitarian Government. These Constitutions are characterized by their strong protection of individual liberties and by the restraints imposed on fascist parties and (in the case of German Basic Law, 1949 and the Japanese Constitution, 1946) upon the raising or deployment of armed forces..."

The same author, in observing that almost all constitutions resemble each other on vital aspects, said: "... though constitutions vary enormously in terms of both of their content and historical background, some common purposes can be detected. This is true at least of the liberal Constitution of the U.S., most European countries, in both the West, and after 1989, the East of the continent, and many members of the Commonwealth; for example Australia, Canada and India. A liberal Constitution is not simply a power-map identifying for its readers the institutions and persons entitled to exercise political power. Constitutions are designed to impose limits on the exercise of authority by a monarch or other holders of power, and to formulate basic rights and freedoms and other fundamental values for the community."

Types of Constitutions

Constitutions provide broadly two types of governments—one Parliamentary, and the other Presidential. In the former type, the Government is run by elected representatives for a fixed tenure through a Council of Ministers and in the latter, it is run by a President elected by the entire people and by a collegium with representatives representing their respective constituencies. If any individual or clique or group of

people wants to usurp power by means not granted by the Constitution, they can only do so by way of a military action. Even after attaining power through such coups, the dictator must come out with a fresh Constitution concentrating most powers in himself, to continue the regime. The history of democratic countries is replete with several instances where people elected democratically through a Constitution became dictators, and then such dictators were overthrown by people and were replaced by elected bodies. Adolf Hitler came to power by means of the parliamentary route. But there was no formal Constitution enacted to enunciate the principles of the Nazi State. Similarly, fascism in Portugal took on clear constitutional manifestations. Keeping themselves in the democratic set up, sometimes political parties exceed their brief and violate constitutional norms and dictates. They try to subvert the constitutions in surreptitious ways. They try to hoodwink the people. In every such attempt, the people, though mostly illiterate, poor and unaware of their rights, ultimately emerge victorious and hold up those lofty ideals which the constitution so zealously guards for them.

Anticipating such situations, Griffin (1998) writes that "... suppose political actors care more about their immediate interests than about preserving the carefully balanced Constitutional scheme. Suppose also that the general language of the Constitution is susceptible to a variety of reasonable interpretation. Further suppose that historical change makes the original meaning of the Constitution difficult to recapture and also create a pressing need for fundamental policy shifts. In these circumstances, it is possible for the entire Government to be controlled by a party interested in pursuing a policy that is at odds with the Constitution. In such a situation, there is no apparent way to enforce the original meaning of the Constitution. The constitution can be frustrated by political parties..." (p. 6).

Lane (1996), regarding the functioning of the Constitution says: "... Constitutions are enacted by political elites with a view to promoting positive results, or at least, contributing outcomes that they consider negative. Such considerations may include broad macro phenomena, for example, political stability, freedom, economic affluence and social justice. Constitutional design or the attempt to promote political, social and economic outcomes by means of engineering constitutions involves two problems, logically speaking. The first set of problems refers to the translation of a formally written Constitution into real life institutions – the regime. The second set of problems deals with the impact of real

life institutions upon social outcomes" (p. 188). He further says that "... the real constitution is the set of actually operating institutions that regulate State power and the relationship between government and citizens". According to him, "...perhaps the best Constitution is exactly that it is a just Constitution" (Lane, 1996, p. 199) and that "... A just constitution is a constitution that satisfies certain normative criteria..". Further that ". . it may seem obvious that a good constitution must be a democratic one" (Lane, 1996, p. 239).

According to Ian Gilmour (1977) "... successful Constitutions and institutions are not mere pieces of machinery. If they work, it is because of the ideas and beliefs of those who try to work them" (p. 70). Ellis Sandoz (1990) cautions that "As the basis of our Government, it ought never be forgotten that the constitution is more than a text, a historical document, or an expression of political philosophy. It is fundamental law, enforceable in courts in all its provisions as the law of the land superior to any other law.... All is lost if we forget that the Constitution is the law, the monument to justice that is conferred in the phrase a Government of laws and not of men." Madison (1788) writing in the Federalist says, "... if men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on Government would be necessary. In framing a Government which is to be administered by men over men, the great difficulty lies in this: You must first enable the Government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions...".

Enter the Constitution

The Constitution of India contains 395 Articles in 22 parts with 23 chapters interwoven, led by the Preamble and incorporating 12 schedules. The Preamble is not shown as a part of the Constitution, but is placed at the beginning, giving an impression that it leads the Constitution. Through certain constitutional Amendment Acts, Part VII was repealed and Part IXA and Part XIVA were inserted; apart from these, the serialization of the Parts was not changed. Similarly certain Articles were inserted or substituted or omitted but the serialization was again not changed.

Part I is related to Union and its territory, Part II about citizenship, Part III relates to Fundamental Rights, Part IV about the Directive Principles of State Policy, Part – IVA about Fundamental Duties, Parts V, VI and VIII about Union, States and Union Territories, Part IX and IXA relate to Panchayats and Municipalities, Part X about the Scheduled and Tribal Areas, Part XI about the relations between the Union and the States, Part XII relates to Finance, Property, Contracts and Suits, Part XIII deals with Trade, Commerce and Intercourse within the Territory of India, Part XIV relates to services under the Union and the States, Part XIVA relates to Tribunals, Part XV relates to Elections, Part XVI contains Special Provisions relating to certain classes, Part XVII relates to Official Language, Part XVIII relates to Emergency Powers, Part XIX relates to Miscellaneous, Part XX relates to Amendment of Constitution, Part XXI relates to Temporary, Transitional and Special Provisions and Part XXII relates to Short Title Commencement and Repeals.

There is no necessity to incorporate all those parts in the Constitution. Certain parts can be severed, but the Constituent Assembly thought that all the provisions contained in these parts should be retained in the Constitution, so that all these provisions, though some of them relate to routine administrative aspects, are given a Constitutional status.

Broadly, the main features of the Constitution are the Preamble, Fundamental Rights, Directive Principles, Union and States, The Scheduled and Tribal Areas, Center-State relations, Judiciary and Amendment. Most of the amendments to the Constitution were made relating to provisions in these subjects only. The Constitution has been amended 104 times so far and some more amendments are on the anvil. At one point of time, there was a move to replace the Constitution. An important question was debated during that time. The question was: can the Constitution be replaced? If it can be replaced, whether the Parliament constituted under the Constitution can replace it or another Constituent Assembly has to be elected? If another Assembly is to be established what is the constituency and how are members to be elected? If not, what is the remedy available for people who want the Constitution to be replaced? Can the Constitution be overthrown? Answers to all these questions were given by the Chairman of the Drafting Committee anticipating such a situation. According to Dr. Ambedkar: "The first thing in my judgment we must do is to hold fast to Constitutional methods of achieving our social and economic objectives... When there was no way left for Constitutional methods for achieving economic and social objectives, there was a great deal of justification for unconstitutional methods" (CAD 1949-11-25, 11.165.323). He ends with a caution, "... If we wish to preserve the Constitution in which we have sought to enshrine the principle of Government of the people, for the people and by the people, let us resolve not to be tardy in the recognition of the evils that lie across our path and which induce people to prefer Government for the people to Government by the people, nor to be weak in our initiative to remove them" (CAD 1949-11-25, 11.165.330). Ultimately, it appears that the main objective of the Constitution is to achieve economic and social equality. It also appears that the provisions contained in these Parts and Chapters of the Constitution are only to further the said objective. Amendments to the Constitution also should be aimed at and brought in only to facilitate a smooth journey towards the main goal.

The Journey begins

Preamble

As stated earlier, the Preamble is at the beginning of the Constitution. It is not just a crown or a crest but a beacon of light illuminating the path of the journey. Symbolically too, it leads the Constitution.

The Preamble to the Constitution reads as follows:

"We, THE PEOPLE OF INDIA, having solemnly resolved to Constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to secure to all its citizens:

JUSTICE, social, economic and political;

LIBERTY of thought, expression, belief, faith and worship;

EQUALITY of status and of opportunity; and to promote among them all;

FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation;

IN OUR CONSTITUENT ASSEMBLY this twenty sixth day of November, 1949 do

HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.

The words 'Socialist Secular' were inserted in the Preamble to describe the Republic. The word 'Integrity' was also inserted after the word 'Unity' in the 'Fraternity' clause of the Preamble by the Constitution (42nd Amendment) Act, 1976. By insertion of these words, it was asserted that the Republic is not just sovereign and democratic, but is also socialist and secular. Likewise, by insertion of the word 'Integrity' it assures not only 'Unity' of the Nation but also its 'integrity'. The Preamble, according to the Supreme Court of India as expounded in the *Re: Berubari Union and the Exchange of Enclaves v. Unknown* (1960) case subsequently, contains the ideals and aspirations or the objects which the Constitution makers intended to be realized, by its enacting provisions.

According to Edward S. Corwin (1924), "... the Preamble is, strictly speaking, no part of the Constitution but 'walks before' it, it nevertheless serves two very important ends: first, it indicates the source from which the Constitution comes, from which it derives its claim to obedience, namely, the people of the United States ...; secondly, it states the great objects which the Constitution and the Government established by it are expected to promote: national unity, justice, peace at home and abroad,

liberty, and the general welfare" (p. 1). The Preamble, in the words of Story is, 'a key to open the mind of the makers'. When the Preamble was considered by the Constituent Assembly several amendments were suggested. The first amendment to add words 'Federal Republic' or 'Independent Republic' was rejected. Another amendment to the effect "to constitute India into, a 'Union of Indian Socialistic Republics'" was also rejected. Another amendment which sought to add "In the name of God" before the line "We the People of India" was also rejected but only after a division was insisted upon. 41 members voted in favour of the amendment and 68 members rejected it. Another amendment which was sought to add the words "the father of our Nation, Mahatma Gandhi" after the words "in the name of God the almighty" was, by leave of the Assembly, withdrawn. A couple of other amendments were also rejected. Before the Preamble was added to the Constitution, Dr. Ambedkar affirmed "that this Preamble embodies what is the desire of every member of the House that this Constitution should have its root, its authority, its sovereignty from the people. That it has" (CAD 1949-10-17, 10.154.574). This is how the Preamble was approved and added to the Constitution. The rest of the Constitution is about how to translate the ideals of "Justice, Liberty, Equality and Fraternity" into action.

The Preamble and the Supreme Court

In Re: Berubari Union and Exchange of Enclaves the Supreme Court had an occasion to deal with the preamble. According to it, the preamble shows the general purpose behind the several provisions of the Constitution but, nevertheless, it is never regarded as a source of any substantive power or limitation. But in the *Kesavananda Bharati v. State of Kerala* (1973) case, it was held that 'the preamble to our Constitution should be interpreted as a part of the Constitution'. In the *Behram Khurshed Pesikaka v. The State of Bombay* (1954) case, the Supreme Court held that 'the rights described as fundamental rights are a necessary consequence of the declaration in the preamble'. In the Kerala Education Bill case it was held that 'to implement and fortify these supreme purposes set forth in the preamble, Part III of our Constitution has provided for us certain Fundamental Rights'. In the Kesavananda Bharati case, the Supreme Court held that the Preamble of our Constitution is of extreme importance and the Constitution should be read and interpreted in light of the grand and noble vision expressed in the Preamble. In this case, the Supreme Court reaffirmed the view taken in the Berubari case regarding the Preamble that "though our Preamble was voted up as is a part of

the Constitution, it is really a 'Preliminary Statement' of the reasons which made the passing of the Constitution necessary and desirable... It was further held that the Preamble of our Constitution cannot be regarded as a source of any prohibition or limitation.." According to the Supreme Court, the only use that could be made of the Preamble in interpreting the Constitution was that where "... the terms used in the Article of the Constitution are ambiguous or are capable of two meanings, in interpreting them some assistance may be sought in the objectives enshrined in the Constitution..."The Supreme Court further clarified that "... the Preamble does not make any grant of power but it gives a direction and purpose to the Constitution which is reflected in Part III and Part IV..."

The dichotomy in the Constitution is manifested at the very threshold of the Constitution. If the Preamble does not make any grant of power or when it is never regarded as a source of any substantive power or limitation as held in Berubari case, then what is the use of its grand recitation of "justice, liberty, equality and fraternity", its assurance of "equality in status and of opportunity, the dignity of the individual and the unity and integrity of the Nation"? Should they remain as pious declarations? The Constitution should have created a mechanism, somewhere inside to compel the State to facilitate the citizens to realize the objectives enshrined in the Preamble and to reach the ultimate goal of equality and fraternity. The Preamble should not simply stare at us like a lifeless mantra. The Supreme Court in the *I. C. Golaknath and Others vs. State Of Punjab* (1967) Case held that "..the Preamble is not a platitude but the mode of its realization is worked out in detail in the Constitution..." But again the scheme to achieve the objectives and aspirations is couched mostly in the Directive Principles, which is again a powerless piece.

As stated earlier the Preamble was enlarged to the extent of inserting the words 'socialist, secular' and 'integrity' by the Constitution (42nd amendment) Act, 1976 with effect from 3.1.1977. As a matter of fact, this addition is not necessary. The placing of these words in fact was discussed in the Constituent Assembly and rejected, as it felt that the purpose of bringing these words was already achieved and the same is available in the words already settled in the Preamble. Dr. Ambedkar intervening in a subsequent discussion on the Draft, explained with regard to adding of the word 'socialist' that "..if these Directive Principles are not socialist in their direction and in their content, I fail to understand

what more socialism can be. Therefore, my submission is that these socialist principles are already embodied in our Constitution" (CAD 1948-11-15, 7.53.41). Similarly, the essence of the expressions 'secular' and 'integrity' were already brought in.

The Forty Second amendment was considered by the Supreme Court in the *Minerva Mills Ltd. and Others v. Union Of India* (1980) case. The Supreme Court took no exception to the amendment made to the Preamble. It held thus:

"Those amendments are not only within the framework of the Constitution but they give vitality to its philosophy; they afford strength and succor to its foundations. By the aforesaid amendments what was originally described as a 'Sovereign Democratic Republic' became a ' Sovereign Socialist Secular Democratic Republic and the resolution to promote the 'Unity of the Nation' was elevated into a promise to promote the 'Unity and integrity of the Nation'. These amendments furnish the most eloquent example of how the amending powers can be exercised consistently with the creed of the Constitution. They offer promise of more, they do not scuttle a precious heritage..."

Thus the Preamble, as expanded by the Constitution (Forty Second Amendment) Act, continues to remain a part of the Constitution. The words 'Secular' and 'Democratic' are not to the liking of certain political parties, particularly the Bharatiya Janata Party. They intended to bring in the word 'Hindu' in place of secular, but they could not succeed in putting their intention into action. Their hatred of the word 'secular' is reflected always in their antagonism towards Muslims and Christians. The barbaric attacks on them in Gujarat and Orissa are nothing but manifestations of their hatred towards them. The demolition of Babri Masjid in Ayodhya in Uttar Pradesh illustrates the height of their intolerance and consistent hatred against Muslims. But the people of India have stood against the onslaught on secularism and have always tried to keep up the sentiments of oneness and togetherness of all people who inhabit this part of the globe.

It is the same with the word 'socialistic'. The Bharatiya Janata Party, mostly, is against socialism. They do not openly preach against socialistic ideals, but canvass the same through some other means. They say the word 'socialism' is much abused and has lost its meaning. Their antagonism is mostly towards the communists and the so-called leftists. The Supreme

Court affirmed the place of these two words which form the basis of nation building. The same party exhibits happiness with the word 'integrity' as if they are the only champions of 'integrity' of the nation.

Fundamental Rights

The Fundamental Rights are included in Part-III, from Article 12 to Article 35. In this Part, Article 21-A, relating to Right to Education is inserted by the Constitution (Eighty Sixth Amendment) Act, 2002. Article 31 relating to Compulsory acquisition of property was repealed by the Constitution (Forty – Fourth Amendment) Act, 1978 with effect from 20.6.1979. Article 31A relating to saving of laws providing for acquisition of estates, etc. was inserted by the Constitution (First Amendment) Act, 1951 with retrospective effect. Clause (1) of Article 31-A, dealing with acquisition of estates and its related matters was substituted by the Constitution (Fourth Amendment) Act, 1955 with retrospective effect. Certain words were either substituted or inserted by the Constitution (Seventh and Forty Fourth Amendment) Acts. Clause (4) to Article 13 was inserted by the Constitution (24th Amendment) Act, exempting amendment to the Constitution from the rigor of Article 13. Clauses (4) and (5) to Article 15, which prohibit discrimination on grounds of religion, race, caste, sex or place of birth were added and inserted by the Constitution First and Ninety Third Amendment Acts, enabling the State to make any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes relating to their admission to educational institutions maintained by the State or receiving aid out of State funds. Clause 4(A) and 4(B) to Article 16 were inserted and substituted by the Constitution 77th, 85th and 81st Amendment Acts, which deal with matters relating to making provisions for reservation in the matters of promotion with consequential seniority to any class and in filling of backlog vacancies. Clause (2) of Article 19 which deals with Right to Freedom was substituted by the Constitution First Amendment Act, empowering the State to impose reasonable restrictions on the exercise of the Right to Freedom in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to Contempt of Court, defamation or incitement to an offence. Certain words were either inserted or substituted in Clause 3 to 6, by the Constitution

16th, 44th and 1st Amendment Acts. Whereas Article 19 guarantees as much as six freedoms, all those can be eclipsed at any time by the State by imposing reasonable restrictions..

Article 22 relating to Protection against arrest and detention in certain cases was amended by the Constitution 44th Amendment Act, 1978. Clause 1A to Article 30 relating to Rights of Minorities to establish and administer educational institutions was inserted by the Constitution 44th Amendment Act. Article 31B relating to validation of certain Acts and Regulations was inserted by the Constitution 1st Amendment Act, 1951. Article 31C relating to saving of Laws giving effect to certain Directive Principles was inserted by the Constitution 25th Amendment Act, 1971 with effect from 20.4.1972. Later, part of this Article relating to questioning certain laws in any Court was held to be invalid by the Supreme Court in *Kesavananda Bharati v. State of Kerala* (1973) case. Article 31D relating to saving of laws in respect of anti-national activities, which was inserted by the Constitution 42nd Amendment Act, 1976, was repealed by the Constitution 43rd Amendment Act, 1977. Article 33 which deals with power of Parliament to modify the rights conferred by this Part in their application to Forces, etc. was substituted by the Constitution 50th Amendment Act, 1984. All these relate to the insertions, substitutions, additions or deletions made in the Fundamental Rights. The tussle between the citizens and State on one side and citizens and courts on the other side and between the courts and the State on the third side, is going on since 1950. The impact of these changes on the citizens and upon the Constitutions is dealt with in the following pages.

Fundamental Rights as viewed by the Constituent Assembly

Sardar Vallabhbhai Patel, the Chairman of the Committee for Minorities, Fundamental Rights, etc, while submitting the Interim Report on Fundamental Rights to the Constituent Assembly on 23 April 1947 said that "... We attach great importance to the Constitution making these rights justiciable..." (CAD 1947-05-02, 3.21.7). He detailed there that the Fundamental Rights Sub-Committee recommended that the list of Fundamental Rights should be prepared in two parts, the first part consisting of rights enforceable by appropriate legal process and the second consisting of Directive Principles of social policy which though not enforceable in Courts, are nevertheless to be regarded as Fundamental in the governance of the Country. While introducing the

Draft Constitution, Dr. Ambedkar said that the most criticized part of the Draft Constitution was that which relates to Fundamental Rights: "... In the opinion of the critics Fundamental Rights are not Fundamental Rights unless they are also absolute rights... It is incorrect to say that Fundamental Rights are absolute while non-fundamental rights are not absolute. The real distinction between the two is that non-fundamental rights are created by agreement between the parties while Fundamental Rights are the gift of the law. Because Fundamental Rights are the gift of the State, it does not follow that the State cannot qualify them..." (CAD 1948-11-04, 7.48.234, 7.48.235). Comparing them with the situation of Fundamental Rights in America which are not absolute, Dr. Ambedkar made it clear by saying that "... What the Draft Constitution has done is that instead of formulating Fundamental Rights in absolute terms and depending upon our Supreme Court to come to the rescue of Parliament by inventing the doctrine of police power, it permits the State directly to impose limitations upon the Fundamental Rights. There is really no difference in the result. What one does directly the other does indirectly. In both cases, the Fundamental Rights are not absolute.." (CAD 1948-11-04, 7.48.239). The Fundamental Rights are, in detail, the six freedoms (originally there were seven freedoms guaranteed under Article 19, but the right relating to property was omitted by the Constitution (44th Amendment) Act, 1978. This freedom i.e. right to property was taken away from the part of Fundamental Rights and included as just a Constitutional guarantee, in Part XII relating to Finance, Property, Contracts and suits as Article 300A, by the Constitution (44th Amendment) Act, 1978.

Fundamental Rights, as seen earlier, are not absolute, but are guaranteed against State action. Even this guarantee can be taken away by the very same State by making a legislation. The State can deprive any citizen of the rights guaranteed in Part III. The Supreme Court of India is considered to be the arbiter of the Constitution. It interprets various provisions of the Constitution in a dispute between the citizen and the State, between the States and the Union and between different States. The law declared by the Supreme Court shall be binding on all courts within the territory of India. In the functioning of the Constitution we have witnessed great battles in the Supreme Court as well as in Parliament. Fundamental Rights are the most affected both in a positive as well as a negativemanner by the interpretation given by the Supreme Court and by legislations brought in the Parliament, from time to time. The citizen for whose benefit the Fundamental Rights are guaranteed is compelled

on several occasions to fight against the State and the Supreme Court as well. The journey of the Constitution is thus wounded with lacerations inflicted by the Legislature, Executive and the Judiciary.

The Fundamental Rights received a heavy dent in the Constitution. Not only was the very first amendment to the Constitution with respect to Fundamental Rights but it is also the most meddled with by the three wings of the State. Different Articles in the Fundamental Rights were amended nineteen times through twelve Amendment Acts. Provisions relating to acquisition of estates etc. were inserted six times. The first Amendment which was brought in the year 1951 relates to the right of admission into educational institutions. The Preamble to the Constitution proclaims social justice, equality of status and opportunity. In consonance with this laudable objective, a measure which was aimed at providing an opportunity to the children belonging to the socially and economically backward classes and Scheduled Castes and Scheduled Tribes was found faulty by the Supreme Court and it came down heavily on the Government which provided for such a measure, knocked down such a facility and deprived them of an opportunity to get educated along with their otherwise fortunate brothers who were born in so called upper castes. This was how it happened.

The Gap and the Leap: From Champakam to Mandal via Balaji and Thomas

Background

Article 15 relates to Prohibition of Discrimination on grounds of religion, race, caste, sex or place of birth. There are certain injunctions against the State. Whenever such discrimination arises, the aggrieved citizen can take action against the State in the appropriate Court. It is a known fact in India, that the children belonging to Scheduled Castes and Scheduled Tribes are denied admission into educational institutions solely on the basis of untouchability and exclusion, which is again based on caste. It is an ignominious part of history, which has to be condemned. Certain benevolent Rajas and Maharajas made special efforts to provide education to those children by making provisions for their entry, paving their accessto education. This practice was continued by the British Government with some initial hesitation. One such provision which caused great outrage in the Madras High Court and equally so in the Supreme Court, was a governmental order providing

certain seats to different communities in the matter of admission into educational institutions managed by them, otherwise called Communal G.O. in the Madras State, the present State of Tamil Nadu.

The State of Madras in the year 1921 issued an order apportioning seats in its Medical and Engineering Colleges which provided that for every fourteen seats the Selection Committee was to admit the following:

Non-Brahmin Hindus	.. 6
Backward Hindus	.. 2
Brahmins	.. 2
Harijans (Anglo-Indians and Indian Christian	.. 1
Muslims	.. 1

This G.O. was not faulted by anyone until the Constitution came into force. One Smt. Champakam Dorairajan filed a writ petition in the Madras High Court challenging the Communal G.O. on the ground of discrimination on the basis of caste in the matter of admission to educational institutions which is violative of Article 15(1) and Article 29(1). A Full Bench of the Madras High Court allowed her petition on July 27, 1950 and struck down the said G.O. as unconstitutional. The High Court proceeded on the lines that allocation of certain seats on the basis of caste amounts to discriminating against people on that ground which is prohibitive of Article 29(2) and Article 15(1) of the Constitution of India. By the order of the High Court, those communities which were denied access to education since generations were once again reduced to that status, after enjoying a benefit for a brief period. Aggrieved by the said judgment, the State of Madras filed an appeal in the Supreme Court of India. A Constitution Bench of the Supreme Court on April 9, 1951 (it was very quick) dismissed the appeal confirming the judgment of the High Court of Madras (*State of Madras v. Champakam Dorairajan*, 1951). Thus the section of students belonging to Backward Classes including Scheduled Castes and Scheduled Tribes were denied admission into Medical and Engineering Colleges.

The Supreme Court did not approve of the stand taken by the State of Madras that the State is entitled to maintain the communal G.O.

fixing proportionate seats in State colleges for different communities, and if certain individual citizens are unable to get admissions into the educational institutions, there is no infringement of their Fundamental Rights. The Supreme Court held that the classification in the said Communal G.O. proceeds on the basis of religion, race and caste and is opposed to the Constitution and constitutes a clear violation of the Fundamental Rights guaranteed to the citizens under Article 29(2). The reasoning of the Supreme Court does not reflect the constitutional philosophy and the doctrine of social justice and equal opportunity. It also did not consider the promises held out by the Preamble. It did not weigh the interests of certain communities which were denied access to education since generations against an individual who enjoys every opportunity under the sky. It sacrificed the interests of certain communities, to protect the interests of one single individual, holding that the right guaranteed under Article 15(1) is an individual right. The Supreme Court did not interpret the concept of equality in a way to help wipe out discrimination. It also did not consider that the endeavour of the State was to achieve equality by resorting to discrimination of some people which is unavoidable in the circumstances.

The Supreme Court, in its anxiety to uphold the right of an individual, by even bypassing the normal principles of law and practice, did not keep in mind the accepted principles of interpretation of the Constitution. Though it may be the first case which came up for their consideration, the experience of the Supreme Court of U.S.A. in the matter of interpretation of the Constitution was very much available to them. Another important factor in this case was that Smt. Champakam did not apply for admission into any Medical College at all. Whether she was qualified for admission into a medical college was also not known. In jurisprudence parlance, firstly, she was not an affected party and secondly, she had no cause of action. By 1951, the jurisprudence relating to Public Interest Litigation was not yet born. Maybe, they were all technical problems, but they affected the normal practice adopted by the courts. According to the said Communal G.O. out of every 14 seats, Brahmins would get two (Smt. Champakam was a Brahmin). In the circle of 14 only 2 Brahmins would be admitted. Prior to the communal G.O. out of 14, almost 12 or 13 seats were being appropriated by the single Brahmin caste, leaving one or two to the entire non-Brahmin community. A corrective measure was invented in the said G.O. in order to provide equal opportunity to all communities. By a narrow

and pedantic interpretation the Supreme Court found fault with the G.O. and constrained the constitutional objectives.

South India took up cudgels against the judgment of the Supreme Court and agitated for rectification of the injustice meted out to them by the said judgment. Great pressure was brought upon the Union Government and finally, the Government came up with an amendment and inserted clause (4) to Article 15 in order to provide equal opportunity. In fact, such an amendment was not necessary. In fact, the Constituent Assembly considered it unnecessary. They felt such necessity only in the matter of employment and introduced Clause (4) to Article 16, which is identical to the present Clause (4) of Article 15. The Constituent Assembly did not anticipate that the Supreme Court would up with such a narrow interpretation. In these circumstances, it is difficult to dismiss the apprehension of Non-Brahmins that both the Madras High Court and the Supreme Court of India were, at that time, heavily leaning towards Brahmins, and as such, in order to safeguard the monopolistic interests of Brahmins, the Supreme Court did not hesitate to cripple the Constitutional philosophy. Expressing very poignant views in the case of *Regents of the University of California v. Bakke* (1978), Justice Mr. Marshall said: "... At every point from birth to death the impact of the past is reflected in the still disfavoured position of the Negro. In the light of the sorry history of discrimination and its devastating impact on the lives of Negroes, bringing the Negro into the mainstream of American life, should be a State interest of the highest order. To fail to do so is to ensure that America will forever remain a divided society..".

The Supreme Court of India could not rise to the occasion to set things right and redress the age old injustice. It appears that the Constituent Assembly had a broader vision in this regard. The Constituent Assembly rejected an amendment which was sought to insert a similar provision in the present Article 15(4), since such a provision had already found place in the Constitution in Article 16(4). Rejecting the amendment, Dr. Ambedkar said that "If these words are added, it will probably give a handle for a State to say 'Well we are making special provisions for the Scheduled Castes' by establishing separate schools for Scheduled Castes when there is a general school in the village open to the children of the entire community" (CAD 1948-11-29, 7.62.126).

The intention was that the children belonging to Scheduled Castes should be given education in the same school along with children

belonging to other communities. Since admissions were denied to the children belonging to Scheduled Castes, especially in higher education and professional institutions, a device was adopted in the manner of the above referred G.O. In the said G.O., no student by design is excluded from entry. Only students belonging to Scheduled Castes are included. In this process, maybe one student belonging to Brahmin community was denied admission, but that does not amount to denying equality to that student, but only a device was invented to provide equal opportunity to those who were denied the same. It was a level processing exercise. But the Supreme Court viewed it in a different way. The broad view expressed by Dr. Ambedkar was belied by the interpretation given by the Supreme Court. Hence, the first amendment was necessitated to the Constitution within a year of its functioning in the shape of Article 15(4) which was couched in language similar to that of Article 16(4). Article 16(4) empowers the State in making any provision for the reservation of appointments or posts in favour of any backward class of citizens, which in the opinion of the State, is not adequately represented in the service under the State. When such a provision is in existence, the resultant action will be exclusion of certain persons belonging to other communities from the service under the State. When there is no objection to such a provision, the Supreme Court ought not to have found fault with the above referred G.O. It should have seen that there is no inconsistency and saved the G.O. under Article 13(1) of the Constitution. The Constitution should not be read in isolation, as accepted by the Supreme Court in a later decision. This was the first dent made to the Constitution by the Supreme Court and the State repaired the same by the first amendment.

Commenting on the Champakam case, Granville Austin (2003) said that the invalidation of the G.O. under challenge in that case was "... undercutting another social revolutionary policy ..." (p. 94) and that "the decision struck at an essential dimension of the social revolution" (p. 95). The Government immediately sought to repair the damage through the first Amendment. The Supreme Court, in an almost similar social set up, but in the matter relating to the appointments to the Judicial Service, invalidated a similar G.O. providing seats on communal basis in the Venkataraman Case. The ratio provided in the G.O. was 3/8 for non-Brahmin Hindus, 3/8 for Harijans and Muslims combined, 1/8 for Brahmins and the remainder for other communities. There was no constitutional prohibition so as to warrant striking down as unconstitutional a provision which was made to achieve equality and

to provide equal opportunity, when Article 16(4) of the Constitution empowers the State for making such a provision. Both the Executive and Legislature came to the rescue of the Constitution when it received the first blow to one of the Constitutional objectives. This time, both Pandit Jawaharlal Nehru and Dr. Ambedkar vehemently supported the amendment. This amendment was brought in to peg a potential danger.

Article 15 and 16 are the two Articles which relate to admission to educational institutions and appointment to services under the State in case of citizens belonging to socially and educationally backward classes, including Scheduled Castes and Scheduled Tribes. Those two Articles were much attacked both in the Supreme Court and outside. The policy of reservations, otherwise introduced to provide equal opportunities for Scheduled Castes, Scheduled Tribes and Other Backward Classes in the matter of education and employment, is much discussed and opposed in educational institutions, educational seminars, media, and other public platforms. It reached a stage where the matter was dragged to the streets by holding demonstrations condemning the very policy of reservation as anti-merit and anti-equality and demanding the scrapping of the policy. Every step introduced by the Executive in furtherance of the objectives of Article 15 and 16 was tested both on streets and in courts including the Supreme Court. The Supreme Court, on various occasions, particularly in the most touted, taunted and maligned Mandal Case, reviewed the policy, approving and affirming it to some extent, diluting and discouraging to another extent.

The Supreme Court at different times expressed its opinion on the policy of reservation stating that the Constitution did not provide any specific and definite right of reservation of seats in educational institutions or appointments to public services in spite of Article 15(4) and 16(4) which proclaims that "Nothing shall prevent the State from making any specific provision for the advancement of Other Backward Classes, Scheduled Castes and Scheduled Tribes and providing reservation of appointments or posts in their favour". The Supreme Court holds that "..Oh! it is only an exception and enabling provision, it is not a right conferred on Scheduled Castes, Scheduled Tribes and Other Backward Classes, as such, they cannot demand for it, it only enables the State to provide seats and appointment, you wait, till the State makes..." and the like. In cases where such arrangement is not made either in any educational institutions or service under the State, the Supreme Court says "..no! we cannot help it, we cannot compel the State for providing

reservations..." Several battles were fought in this regard. The first battle was lost in the Supreme Court. The people for whose benefit the principle of representation was provided in the Constitution launched struggles outside and the Executive rectified the injury and brought in the first amendment.

The second battle was relating to the quantum of reservation. Article 15(4), after its insertion, speaks of making special provisions for the *advancement* (emphasis added) of any socially and educationally backward classes of citizens or for Scheduled Castes and Scheduled Tribes. The emphasis is on the word advancement and the advancement aimed at is of the people who are socially and educationally backward. What would be the extent that it is to be provided in the special provision depends on the extent of advancement necessary. If the need is more, the provision should be more in order to meet the gap and if the need is less the provision can be shortened or limited. The need varies from situation to situation and from time to time. The Supreme Court in a later decision went to the extent of saying that the scheme can be closed provided the minimum percentage of representation of these classes is reached. It is not just a matter of representation; it is a matter of participation. There will be no danger to the country if members of the said community are found to be a little in excess.

Article 16(4) which is found in the original draft speaks of making provision for the reservation of appointments or posts in favour of any backward classes of citizens which, in the opinion of the State, is not adequately (emphasis added) represented in the services under the State. The emphasis in this Article is on adequacy. The extent of reservation in appointments and posts will depend upon the quantum of adequacy. What is the limit of adequacy is not defined in the Constitution, but it is left to the opinion of the State.

The policy of reservations both in admissions and employment was in vogue prior to the advent of the Constitution. The British Government found a yardstick for providing the reservation on the basis of percentage of population of these classes as against the population of the country. Before the commencement of the Constitution, the percentage for Scheduled Castes was kept at 8 and for Scheduled Tribes 4, based on the All India Census prepared in the year 1921. A similar basis is also found in the Constitution in Article 330 which relates to reservation of seats for Scheduled Castes and Scheduled Tribes in the Legislature.

This speaks of proportional representation based on the population of these classes.

At the time of the Constitution coming into force, in the State of Composite Madras, comprising the whole of present Tamil Nadu, whole of Andhra area and parts of Karnataka and Kerala, the percentage was a little higher than their population. After the advent of Constitution too, it was continued and nobody found fault with it. In the year 1963, the Government of Mysore made a provision of reserving 68 percent of seats in favour of Backward Class of citizens in admission to professional colleges. This was challenged and the Supreme Court in the *M. R. Balaji and Others v. State of Mysore* (1963) case, while approving the rule of reservation in the matter of admission into educational institutions and further holding that reservations can be provided even by an administrative order without a statutory rule, fixed for the first time an upper limit for reservation at 50 percent. In the Balaji case, the Supreme Court not only struck down this provision as illegal but also held that reserving seats more than 50 percent is a fraud on the Constitution. The upper ceiling was approved in *Indra Sawhney and Others v. Union of India* (1992) judgement. In spite of Balaji, the States of Tamil Nadu and Karnataka provided reservation in the matter of admission to institutions at 68 percent and 67 percent respectively. The Parliament placed these provisions in the 9th Schedule beyond the reach of Courts. The Supreme Court developed another theory called 'merit and efficiency' and lamented on several occasions that the standards are falling because of reservations. The Supreme Court further directed the States not to weaken standards of education or lower the efficiency of scholars to the detriment of national interests. The Supreme Court believes that educational standards are falling because of reservations and the merit and efficiency are being sacrificed. There is no scientific data to establish that merit and efficiency are going down because of reservations. It also could not specify what 'merit' is and how it has to be measured.

The Constitution speaks of adequate representation and advancement of Scheduled Castes, Scheduled Tribes and Other Backward Classes. The quantum of reservation is to be fixed keeping in mind 'advancement' and 'adequacy'. Picking up the spirit of Constitution in these matters, the Supreme Court in one solitary case of *State of Punjab v. Hiralal and Others* (1970), dealing with the quantum of reservation, held that "the mere fact that the reservation made may give extensive benefits to some of the persons who have the benefit of the reservation does not

itself make the reservation bad. The length of the leap to be provided depends upon the *gap* to be covered" (emphasis added). Therefore, if the gap to be covered is more than 50 feet, you have to take a leap to cover those 50 feet. If the gap is 68 feet, take a leap of 68 feet. There cannot be a fixed and rigid limit in matters of admission to educational institutions and appointments in the service of the State, particularly when they have been denied opportunity for centuries.

As stated earlier, the rule of upper limit of 50 percent was approved by the Supreme Court in the Mandal case, which will be discussed shortly. Though an orthodox view was usually being adopted by the Supreme Court in the matter of reservation, we witness in one or two occasions that a dynamic approach emerged in tune with the spirit of the Constitution. Otherwise, in a series of decisions, the Supreme Court, it appears, did not encourage the State in making special provisions in favour of the disadvantaged sections of society, by holding that reservation of seats is impermissible in super-specialities and doctoral courses. On the whole, the Supreme Court is of the view that the special provisions permissible under Article 15(4) are not confined to positive action programmes for the advancement of backward classes. It envisages a policy of compensatory or protective discrimination but it should be reasonable and consistent with ultimate public interest i.e. national interest and the interest of community or society as a whole.

The Supreme Court failed to note that bringing the students belonging to Scheduled Castes, Scheduled Tribes and Other Backward Classes on par with the rest of the students is also a public purpose and is in the interests of the nation and the society. Keeping half of society at an inferior level by always refusing to provide equal opportunity cannot be in the interest of the nation and society. Besides, the concepts of positive discrimination and affirmative action are borrowed from American experience where there is no discrimination on the basis of birth, though there exists a prejudice on the basis of colour and race. In *Indra Sawhney and Others v. Union of India* (1992) or Mandal case, the Supreme Court discouraged interpretation of the Constitution of India on the lines of American Constitution. The Supreme Court continued to view Article 15(4) as an exception to Clause (1) in so far as it forbids discrimination on the ground of 'race' or 'caste'. It is also in the nature of exception to Article 29(2). The Supreme Court failed to recognize that the whole act of discrimination and deprivation is only due to 'caste' in India and to remove those discriminations and deprivations, a provision has to be

necessarily made using the very same 'caste'. Equality cannot be achieved while ignoring the ground realities and factual situation.

Another aspect of reservation which received considerable amount of opposition is the reservation in the matter of appointments or posts in services under the State as provided in Article 16(4). The whole attack and the interpretation of the Constitution given by the Supreme Court necessitated two amendments to the Constitution. Marc Galanter, writing in 1984, noted that in 24 litigations, the Supreme Court upheld the government's preferential scheme in only 8 cases and struck it down in whole or in part in 16 cases.

The spectrum of the decisions of the Supreme Court starts with *The General Manager, Southern Railway v. Rangachari* (1961), is consolidated in *State of Kerala v. N. M. Thomas and Others* (1975), crystallized in *K.C. Vasanth Kumar & Another v. State of Karnataka* (1985), centralized in *Indra Sawhney and Others v. Union of India* (1992), suffered in *Ajit Singh Januja and Others v. State of Punjab and Others* (1996) & *Ajit Singh and Others v. State of Punjab and Others* (1999) and *Union of India and Others v. Virpal Singh Chauhan* (1995), and received affirmation again in *M. Nagaraj and Others v. Union of India and Others* (2006). In substance the theme of Article 16(4) was exposed by the Supreme Court thus: "... The special provision in Article 16(4) has been made to remove the effect of centuries of discriminatory treatment and to raise the downtrodden to an equal status and so cannot be regarded as discriminatory against anyone..." The court on the other hand affirms that Article 16(4) is an enabling provision as such no *mandamus* can be issued to compel the Government to make reservation. A very affirmative stand was taken in the Thomas case. Earlier there were differences of opinion regarding the applicability of principle of reservation in the initial appointments and in promotions, and in selection of posts. Likewise, there were differences of opinion regarding lowering of certain percentage of marks, giving concessions in similar standards or exclusively providing opportunity to improve their standards in favour of the Scheduled Castes, Scheduled Tribes and Other Backward Classes The court viewed that Article 16(4) is only an exception and that no one can claim any fundamental right for being provided with special provisions in their favour because of Article 16(4). This view was changed in the Thomas case, by a Special Bench consisting of seven Judges of the Supreme Court. In this case, almost all the earlier decisions rendered in the matter of Article 14,

15(4) and 16(4), 46 and 353 of the Constitution were reviewed. The Court held thus:

"...The claims of members of Backward Classes require adequate representation in legislative and executive bodies. If members of Scheduled Castes and Tribes, who are said by this court to be Backward Classes, can maintain minimum necessary requirement of administrative efficiency, not only representation but also preference may be given to them to enforce equality and to eliminate inequality...."

In this context, it is to be noticed that there is no relaxation of any standards of qualifying examination for admission into any professional course. When candidates belonging to the backward classes possess the minimum qualification for entry into any course, no one can say that they possess lesser merit. Unfortunately, merit in this country is measured by marks obtained in a particular examination. It is everybody's knowledge as to how marks are awarded to students and how prejudices in the name of caste work in this country. The bogey of merit is raised by the court every time the question of reservation is considered, without any scientific basis. By observing that the element of reservation necessarily results in inefficiency, the court stamps a badge of inefficiency on them. The courts on many occasions miss the point that "equality of opportunity for unequals can only mean aggravation of inequality". Similarly, they sometimes miss the point that "the idea of equality" has different shades of meaning and connotations. It has many facets and implications. The claim for equality is in fact a protest against inequalities and injustices. It is a symbol of man's revolt against chance, man-made disparity, unjust power and crystalised privileges..." The Supreme Court in the Thomas case very emphatically affirmed that "...If equality of opportunity guaranteed under Article 16(1) means effective material equality, then Article 16(4) is not an exception to Article (1). It is only an emphatic way of putting the extent to which equality of opportunity could be carried viz., even upto the point of making reservation.." Ultimately it was accepted in the Mandal case. The minority opinion expressed in the *T. Devadasan v. The Union of India and Anothe*r (1963) case was:

"...The expression 'nothing in this Article' is a legislative device to express its intention in a most emphatic way that the power conferred thereunder is not limited in any way by the main provision but falls outside it. It has really carved out an exception, but has preserved a power untrammeled by the other provisions of the Article.."

These most poignant observations were accepted by a majority of the Judges in the Thomas and Mandal cases. In spite of this, the courts hesitate, sometimes, to emphatically approve of State action in furtherance of the untrammeled power given to the State by the Constitution under Article 16(4), by taking the plea of "enabling provision". As a matter of fact, every power enables the State to do something or the other according to the powers conferred upon it under various provisions of the State. Similarly several fundamental rights are couched in negative phraseology. In Thomas case, the Supreme Court held that Articles 14 to 16 are a common code of guaranteed equality and are like a compendium.

Another thrust given to the 'voyages of reservation' is the *Akhil Bharatiya Soshit Karamchari Sangh v. Union of India and Others* (1980) case . It is almost a reiteration of the view taken in the Thomas case, and held thus:

"..Article 15(4) and 16(4) have to be read together with Article 15(1) and 16(1). Article 16(4)is not a jarring note but auxiliary to fair fulfillment of Article 16(1).The prescription of Article 16(1) needs, in the living conditions of India, that concrete sanction of Article 16(4) so that those wallowing in the social quagmire are enabled to rise to levels of equality with the rest and march together with their brethren whom history had not so harshly hamstrung.."

It is not enough to just read Article 15(4) and 16(4) together with Article 15(1) and 16(1), but they should also be read along with Article 46 of the Constitution. Article 46, which is a command to the State, says that "The state shall promote with special care the educational and economic interest of the weaker sections of the people, and in particular of the Scheduled Castes and Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation." This is a positive command not couched in any negative language nor beginning with a non-obstante clause. The experience of all these years shows us that the State has completely forgotten the Constitutional command. No sincere or serious efforts are made by the State to promote the educational and economic interests of these classes. The Article commands the State not only to just promote, but ensure that the promotion should be with special care. It does not just leave it like that. The command further goes to the extent that the State shall protect the weaker sections of society and in particular, the Scheduled Castes and Scheduled Tribes. On these two counts there appears to be a colossal failure on the part of the State.

Without promoting with special care the interests of these classes, no useful purpose will be served if only jobs are kept reserved for them. Without preparing them for the jobs and the seats, blaming them for being substandard or inefficient or mediocre is nothing but denying them the benefit altogether. Without initiating any measure both at social and economic levels, and lifting them out of bonded labour, wage slavery, insufficient wages, exploitation of labour and person, oppression of the social hierarchy but leaving them in the lurch, and then beguiling them by saying "Aye! Come up! I have provided admission for you in a school or college or kept a post for you" is nothing but a mockery. In such circumstances, the court says "Oh no! We cannot issue *mandamus* to the State to act in accordance with Article 46, since that command is non-justiciable..." The State does not take interest and the courts do not mandate the directives. Therefore, the equality aimed at in Article 15(1) and 16(1) through the route of Article 15(4) and 16(4) is still eluding the weaker sections of the society. Even the Supreme Court of America, in the *Steelworkers v. Weber* (1979) case, held that the quota "is not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance."

Adequacy and Advancement

Mandal case

In the matter of education and employment in favour of Scheduled Castes, Scheduled Tribes and Other Backward Classes, the Supreme Court has taken a firm stand in the*Indra Sawhney and Others v. Union of India* (1992) or Mandal case. On the positive side of Constitutional obligations, it is not a landmark judgment, since the court followed and approved its earlier judgments on the subject, but on the negative side, it can be said that it did more harm than good. The Mandal case is being considered as the last mantra so far rendered in the matter of reservation in favour of Scheduled Castes, Scheduled Tribes and Other Backward Classes.

The issue taken up by the Supreme Court in the Mandal case is very simple viz., validity of the two Official Memoranda dated 13 August 1990 and 25 September 1991. Through the first Official Memorandum, the Government of India extended reservations to socially and educationally backward classes in its services by reserving 27 percent of the seats. This is in addition to the reservations already in existence in favour of the

Scheduled Castes and Scheduled Tribes. It is very simple. 27 percent of seats are reserved for Socially and Educationally Backward Classes through an administrative order, and the Supreme Court is asked to decide its validity. For this, there is no necessity of constituting a Special Bench with 9 Judges of the Supreme Court. Prior to this, there was no conflict of opinion or differing judgments of Benches consisting of 7 Judges. Reservations to Socially and Educationally Backward Classes otherwise called as 'Other Backward Classes' (OBCs) were extended for the first time in the year 1990 i.e. exactly after 40 years of the formation of the Republic. Prior to 1990, reservations were limited to the Scheduled Castes and Scheduled Tribes since they were available to them even prior to the Constitution. The same have been continued since the Constitution approved them.

The Constitution also extended reservations in favour of socially and educationally backward classes in the matter of admission into educational institutions and to appointment and posts in the service of the State. As there is no list of those Socially and Educationally Backward Classes in whose favour the reservations were extended in 1950, it was not possible for the Government of India to provide reservations to them, whereas such a list was available in the case of Scheduled Castes and Scheduled Tribes in the Government of India Act, 1935. The same list continued after 26 January, 1950. In fact the Constitution did not use the words 'Scheduled Castes' and 'Scheduled Tribes' in Article 16(4) but only used the words 'backward classes'. In Article 16(4A) , the words 'Scheduled Castes' and 'Scheduled Tribes' were used only after the Constitution amendment in the year 1995. In Article 15(4), after the first amendment in the year 1951, the three terms 'Backward Classes', 'Scheduled Castes' and 'Scheduled Tribes' are used.

The Government of India realized the lacuna and appointed a Commission headed by Kakasaheb Kalelkar in the year 1953 to identify the classes which would be entitled to reservations. The Commission submitted its report in the year 1955 and identified 2399 castes as socially and educationally backward classes. This report was not accepted by the government and was kept in cold storage. Some state governments that had already prepared lists of 'Socially and Educationally Backward Classes' continued the benefit of reservation to those classes.

Twenty four years later, another Commission was appointed under the Chairmanship of B.P. Mandal, for the same purpose and the said

Commission submitted its report in the year 1980. But this report too, met with the same fate as the Kakasaheb Kalelkar report, till 1990. In 1990, some of the recommendations of the Mandal Commission were accepted by the Government of India. As part of these, with regard to employment, it issued an order reserving 27 percent of seats in Central Services, which was then challenged in court. This is the background of the Mandal case.

The Official Memorandum dated 13 August, 1990 reserved 27 percent of the seats for Socially and Educationally Backward Classes in addition to those already reserved for Scheduled Castes and Scheduled Tribes. Reservation was to apply to direct recruitment. The issuance of this Official Memorandum led to widespread protest, self-immolations and damage to public and private property. Surprisingly, the Court made an appeal to the Nation that the matter was being adjudicated upon and everybody's rights would be worked out. Since the situation did not improve, the Supreme Court Bar Association filed a petition in the matter and a Five Judge Bench stayed the operation of the Official Memorandum dated 13 August, 1990. In the first instance, the Supreme Court ought not to have reacted to incidents happening outside of it, which was a matter to be taken care of by the Executive. After the change of the Government, another Official Memorandum dated September 25, 1990 was issued, modifying the earlier Official Memorandum, by introducing economic criterion. Ultimately the matter was heard by a Nine Judge Bench.

The Bench, by a majority of 6:3, upheld the Constitutional validity and enforceability of the Official Memorandum dated 13 August, 1990. The reservation provided for economically backward classes was held unconstitutional. The Bench framed several questions for adjudication which were not raised. The important deviation was introducing the theory of 'Creamy Layer'. The 'means test' signifies imposition of an income limit, for the purpose of excluding persons (from the backward classes) whose incomes were above the said limit and those individuals were to be eliminated from the purview of the benefit of reservation. Having rejected the 'economic criterion' for providing reservation to economically backward sections, it is strange that the Supreme Court introduced the same concept and denied reservation to socially and educationally backward classes only on the basis of economic advancement. This was not contemplated by the Constitution. Whether it is desirable to exclude the Creamy Layer or not is a question to be widely debated. Whether the

stigma or the odium of the 'caste' is taken away by economic advancement is also a question to be decided. Whether the 'Indian psyche' accepts economic equality without any reference to the caste of the individual is also to be debated. The experience of Indian society answers in the negative to these questions. These are all large questions to be decided by social scientists, sociological and political experts. Caste is also a question of politics. Strangely, the Supreme Court without any arguments from either side on this aspect, unilaterally decided, ignoring the fact that the same was not an issue before it for adjudication. Normally, no court adjudicates upon an issue which is neither pleaded nor argued. The courts only decide on questions which are relevant to the issue brought before them. They cannot indulge in a roaming exercise and rope in all other relevant questions, though such questions are to be decided at one point of time or other. This aspect of 'Creamy Layer' is not applied in the case of Scheduled Castes and Scheduled Tribes.

Similarly the concept of the upper limit of 50 percent reservation was also affirmed, though it was not raised. The courts, having said earlier that the Constitution has not stipulated any upper limit, in 1963, sealed it at 50 percent. The Constitution speaks of 'advancement' and adequacy. The provision of providing reservations is to help the advancement of Socially and Educationally Backward Classes, Scheduled Castes and Scheduled Tribes in the field of education and to attain 'adequacy' in the field of employment. It is for the State to decide at a particular time what is the quantum of reservation necessary for the advancement of these classes and how much is adequate to provide due representation of these classes in the field of public employment. It may vary from place to place and from time to time. The Supreme Court simply put a thumb mark at 50 percent without any rationale behind it. The Tamil Nadu Government thought 68 percent was necessary both for 'advancement' as well as 'adequacy', while the Karnataka Government thought of 67 percent.

Another deviation the Supreme Court took was in holding that reservation is constitutionally impermissible in case of promotion. This has far reaching consequences. The Constitution speaks of "appointments" or "posts" and an incident to it. It is commonly understood that "promotion" is also included in the word "appointment" or "post". In *The General Manager, Southern Railway v. Rangachari* (1961) case, a Constitutional Bench held that reservation in promotion is constitutionally valid. This judgment was holding the field for thirty years. The Supreme Court in Mandal Case, suddenly made a somersault and held that reservation

in promotions is not valid. The issue whether reservation in promotion is valid or not is not before the Supreme Court. Still it took it up suo motu and decided against it. It is very interesting to note that the Supreme Court noted a preliminary objection "... that this question does not arise at present, and that, as per the well-established principles of Constitutional Law that constitutional questions should not be decided in vacuum, and that they must be decided only if and when they arise properly on the pleadings of a given case, and where it is found necessary to decide them for a proper decision of the case..." Having recorded this objection, the Supreme Court went ahead on the ground that this Larger Bench was constituted with a view to "... finally settle the legal position relating to reservations.."This is nothing but arrogating powers to itself and enlarging its limits, only with a view to superimposing its view. It is to be noted that there is no mention in the reference to the Larger Bench that the legal position relating to reservations has to be finally settled. The reference is only regarding the Constitutional validity of the Official Memoranda referred to above providing reservations in appointment to public service for Socially and Educationally Backward Classes. The Rangachari case was decided by Seven Judge Bench. That decision was followed in several other cases till it was reversed by the Mandal Case. This necessitated the Constitution (77th Amendment) and (85th Amendment) Acts. The amendments in the form of Article 16(4A) are to the effect that reservation in promotion, with consequential seniority is valid.

The Supreme Court in Mandal case also brought in the theory of 'Merit'. The opinion that reservations are anti-merit is not scientifically proved with any established data. The very expression 'merit' is not explained. There is nothing like merit, and even if there is, it has no relation to the caste of the individual. 'Merit' is a notion of the so called upper castes. Grabbing opportunities and excluding others by a mere jolt of the caste hierarchy may, perhaps be considered as merit. Those who lack opportunities lack 'merit' too. That is why the Constitution of India promises equality in status and 'equal opportunity' in the Preamble itself. This aspect is totally ignored by the Supreme Court. In this context, it is to be noted that this country manned by so called 'meritorious' and 'efficient' people has slid to the rock bottom among nations. In the Human Development Index, India stands at No.128 in a group of 134 nations of the world.

Another aspect was also decided unilaterally by the Supreme Court, without there being pleadings. The Supreme Court excluded certain departments like super-speciality in medicine, engineering and other such courses in physical sciences and mathematics, in defence services and in the establishments connected therewith. Similarly the posts of professors, pilots in Indian Airlines and Air India, scientists and technicians in Nuclear and Space application are also excluded from the purview of reservations, even at the initial stage. There is no basis shown for such exclusion. It only reflects the fanciful imagery of a feudal mind. Both the Constitutional Amendments which were incorporated as Article 16(4A) and 16(4B) were challenged in the Supreme Court and both were held to be constitutionally valid by a Constitution Bench of the Supreme Court in the *M. Nagaraj and Others v. Union of India and Others* (2006) case.

Summing up, we find different attitudes and approaches shown by the Supreme Court regarding reservations. The very concept of 'reservations' is not truly and correctly appreciated by the Courts. They are under the impression that reservations are something like an act of charity by the government, a grant of concessions providing certain exemptions. All through and on each occasion, the Supreme Court laments that the standards are being lowered in order to provide opportunities to Scheduled Castes and Scheduled Tribes, merit is being sacrificed and the interests of the nation are being jeopardized. It always cautions the Government, whenever a provision is made providing reservations, to keep in mind 'the efficiency in the administration' as if efficiency is being affected by provision of reservation. Finally it warns the government not to provide reservation at all in certain establishments and departments, thereby totally closing down opportunities in those areas to acquire higher learning and achieve excellence to Scheduled Castes and Scheduled Tribes.

The court has been viewing reservation as a poverty alleviation measure. At one stage it was of the view that it is providing an opportunity to have a peep into the administration but not to have any redressal of the deprivation. It tried to equate reservations with affirmative action. It looks as if it is something related to positive discrimination. It tried to look at American jurisprudence on the subject for guidance. Majority of the judgments consider that the provision relating to reservations are by way of 'enabling provisions' which goes to show that they enable the executive to do something to improve the situation in which the

Scheduled castes and Scheduled Tribes are placed in the field of education and public employment. The provision for reservation was considered as an exception, which again goes to show that you cannot compel the State to do something."

In the very beginning the Court said you cannot seek a *mandamus* directing the State to come up with a positive plan to provide adequate representation or for the advancement of socially and educationally backward classes. They were saying that even if a provision were made, the courts would test them on the touchstone of Article 14. At one stage the court said that reservations are applicable in case of promotion also. At another stage it says "No! No reservations in promotions'. At one stage it says the reservation shall not exceed 50 percent. At another stage it says it can exceed as per the exigencies of the situation and finally warns 'do not transgress the benchmark of 50 percent.' At one stage, it says reservations are valid in promotions, but no seniority will be conferred. Several such variant attitudes on different facets of reservations. At one stage, it asserts that reservations are not a charity but about parity. Thus, we see the very essence of reservation is missed by the Supreme Court.

The concept of reservation is not about providing some seats in an educational institution or keeping apart some jobs in public services. It is also not just lowering some marks at the qualifying test or granting some exemptions or concessions. The very concept of reservation is to ensure participation in the governance of the country. It is not just a representation but a participation, and that participation will be at all levels. To ensure this participation, reservation is a means, it is a mode to achieve a higher purpose, since, for several centuries the Scheduled Castes and Scheduled Tribes have been kept away from education, employment, administration and governance. In order to bring them into the echelons of power and in order to restore human dignity to those sections which were condemned by law to do only certain menial jobs and prohibited from taking up any other job except those to which they were ordained. It is something like lifting them from the mire of 'exclusion' and placing them in mine of 'inclusion'. In this process certain measures are necessary for the State to undertake. Reservations are one such measure. It is not the end of it. It is only a beginning. It is only an attempt to get an entry. The executive and the courts appear to be satisfied with the initial attempts. Exclusion of these people for centuries together may have a baneful effect not only on the entire class, but also on entire society. The whole system has to be cleansed. It is not

just a matter of ironing out creases or fixing up dents, but it is a pure question of levelling ups and downs. It is not just a level playing process, it aims at equal partnership. It is neither pejorative nor a palliative. It is a participatory process. It is a process of overcoming prejudices. Persons who enjoyed every advantage and marched ahead knocking down several millions of fellow citizens, should realize that those deprived must also be provided with an opportunity to join them in the march of life. This is the purpose of reservations. It is only a small measure to achieve the pledge of "equality in status and equal opportunities" embossed in the Preamble of the Constitution. In this context, it is interesting to note the attitude of the Supreme Court of America in the Bakke case:

"... Court would be asked to evaluate the extent of the prejudice and consequent harm suffered by various minority groups. Those whose societal injury is thought to exceed some arbitrary level of tolerability, would be entitled to preferential classifications at the expense of individuals belonging to other groups. Those classifications would be free from exacting judicial scrutiny." The caution handed out by the American Supreme Court should be heeded.

The fusion of these two segments, arbitrarily and artificially divided segments by none else than religious bigotry, is the aim of the Constitution, which is again spelt out in the preamble. This aspect was missed by the Courts and they are only playing on the peripheries.

As far as Scheduled Castes and Scheduled Tribes are concerned, there are other provisions which facilitate their representation in the Lok Sabha as well as State Legislatures. These Articles are included in Part XVI under Special Provisions relating to certain classes.

Participatory Procedure

Article 330 provides reservation of seats for Scheduled Castes and Scheduled Tribes in the Lok Sabha. According to Article 330(2), the number of seats reserved for Scheduled Castes and Scheduled Tribes, will be in proportion to their share in the total population of the country.

Article 332 provides for reservation of seats for Scheduled Castes and Scheduled Tribes in the Legislative Assemblies of the States. According to Article 332(3), the seats to be reserved will be again according to the proportion to their share in the total population of the respective

States. According to Article 334, the reservation of seats shall cease to have effect on the expiration of a period of ten years originally and later amended to sixty years from the commencement of the Constitution.

According to Article 331 and 333, representation of the Anglo-Indian Community is provided for in the Lok Sabha as well as Legislative Assemblies of the States. In the case of Lok Sabha, not more than two members of the community and not more than one in the case of Legislative Assembly will be nominated by the President and Governor of the State respectively. This special representation also shall cease to have effect after expiry of sixty years.

The Constituent Assembly wanted that this special representation of Scheduled Castes and Scheduled Tribes should continue for only ten years. Though there was a demand from several members to keep this reservation for a longer period than ten years, the Constituent Assembly settled it for ten years. Dr. Ambedkar, while replying to the debate on this subject, said:

"...I personally was prepared to press for a longer time, because I do feel that so far as the Scheduled Castes are concerned, they are not treated on the same footing as the other minorities. For instance, so far as I know the special reservation for Mussalmans started in the year 1892; so to say the beginning was made then. Therefore, the Muslims had practically enjoyed these privileges for more or less sixty years. The Christians got this privileges under the Constitution of 1920 and they have enjoyed it for 28 years. The Scheduled Castes got this only in the Constitution of 1935. The commencement of this benefit of special reservation practically began in the year 1937 when the Act came into operation. Unfortunately for them, they had the benefit of this only for two years, since from 1939 practically upto the present moment or upto 1946, the Constitution was suspended and the Scheduled Castes were not in a position to enjoy the benefits of the privileges which were given to them in the 1935 Act and it would have been quite proper, I think, and generous on the part of this House to have given the Scheduled Castes a longer term with regard to these reservations. But as I said, it was all accepted by the House..." (CAD 1949-08-25, 9.124.92).

It is also on record that the Scheduled Castes Members wanted this term to be limited to only ten years. The House also wanted the same to be limited. It is not new for the Constitution of India to provide

reservations for the Scheduled Castes and Scheduled Tribes, but the same was provided by the British Government in the 1935 Act. The same is continued in the Constitution of India. The period of ten years was being extended from time to time through Constitutional amendments. Through an amendment, the period was changed to 'twenty years' in the year 1960. Then it was replaced by 'thirty years' in 1980 then to 'forty years' in 1989, and then to 'fifty years' in 1999 and later made to 'sixty years'. By this the special representation of Scheduled Castes and Scheduled Tribes in both Lok Sabha and State Legislative Assemblies is going to cease by the year 2010. We do not know whether this will be maintained or extended again for a further period of ten years or more. Going by the indications of earlier extensions, it appears likely that they may be extended.

It is to be seen that the demand for extension of the term of 'ten years' or the like, has not come from members of the Scheduled Castes and Scheduled Tribes. The party in power, at the Centre, mostly the Congress, has been *suo motu* extending the term. It appears that the special representation of Scheduled Castes and Scheduled Tribes is more to the advantage of the party in power than to the members of the Scheduled Castes and Scheduled Tribes themselves. The party in power can choose dummies as their candidates to represent the reserved constituencies. Since there is no strong contest amongst Scheduled Castes and Scheduled Tribes, normally, the candidates supported by the ruling party will be easily elected. Thereby, the ruling party is certain of certain number of seats. The representatives also owe loyalty to the party. Though the constituencies are reserved for Scheduled Castes and Scheduled Tribes, all persons belonging to all communities registered as voters in the constituencies have to vote. Naturally, the voters not belonging to Scheduled Castes and Scheduled Tribes will be in a majority. The candidates belonging to Scheduled Castes and Scheduled Tribes are at their mercy. In practice, it is with the votes cast by voters not belonging to Scheduled Castes and Scheduled Tribes that the candidates contesting in the reserved constituencies are being elected. In such circumstances, such candidates, though they belong to Scheduled Castes and Scheduled Tribes, cannot represent the cause of Scheduled Castes and Scheduled Tribes, which is the main purpose of reservations. The political parties only choose candidates who listen to them. If any candidate exhibits any signs of individuality or commitment to the cause of Scheduled Castes and Scheduled Tribes will be snubbed and denied a ticket. If, after elections, any such candidate shows a little assertiveness in his

functioning as a representative of the Scheduled Castes and Scheduled Tribes, he will be marked out, and denied a ticket in the next election. Without patronage from a political party, that too a major political party, the Scheduled Castes and Scheduled Tribes are not in a position to stand on their own and win elections.

In the 1952 elections, many candidates who were illiterates were chosen as their candidates by the Indian National Congress Party. The same pattern continues, more or less, even after so many years of the Constitution. There are exceptions, people who truly represent the aspirations of Scheduled Castes and Scheduled Tribes and work for their welfare, even at risk of their political career. Very slowly, leadership is emerging from such quarters. The very purpose of providing reservations, which is to provide participation in the administration, is thus lost. There is no concerted effort on the part of such candidates to improve the lot of Scheduled Castes and Scheduled Tribes.

There is a limit on the period of reservations only as far as the representation in the Lok Sabha and Legislative Assemblies is concerned. There is no such limit in case of admissions to educational institutions and appointments in State services. The special provision provided under Article 15(4) and 16(4) speaks of advancement and adequate representation. In a situation under Articles 330 and 332, where there is a time limit, a vocal section of so called upper castes, insists on extension of time; whereas in a situation where there is no time limit, questions like 'how long will reservations continue?' are raised by this section and they want the special provision to go immediately. It is for the Scheduled Castes and Scheduled Tribes to really make use of these provisions to their advantage, assert themselves as and when the opportunity arises, and take real participation in the administration of the country. If that is not achieved, the provisions made under the Constitution may not realize their purpose.

From Untouchability to Atrocities via Civil Rights

Article 17 is one of the foremost Articles which was included in the Fundamental Rights Chapter, and was aimed at not only restoring human dignity to the erstwhile untouchables but to humanize the civil society. Under Article 17 'untouchability' is abolished and its practice in any form is forbidden. It further says that the enforcement of any disability arising out of 'untouchability' shall be an offence punishable

in accordance with law. The Constituent Assembly applauded this Article: "... which proposes to save one-sixth of the Indian population from perpetual subjugation and despair, from perpetual humiliation and disgrace..." (CAD 1948-11-29, 7.62.168). It further pointed out that "... It is an irony of fate that the man who was driven from one school to another, who was forced to take lessons outside the classroom, has been entrusted with this great job of framing the Constitution of free and independent India and it is he who has finally dealt the death blow to this custom of untouchability, of which he was himself a victim in his younger days" (CAD 1948-11-29, 7.62.169).)

The Supreme Court held in the *N. Adithayan v. The Travancore Devaswom Board and Others* (2002) case that, "The vision of the founding fathers of Constitution to liberate the society from blind and ritualistic adherence to mere traditional superstitious beliefs sans reason or rational basis has found expression in the form of Article 17." Article 17 warns that the enforcement of any disability arising out of untouchability shall be an offence punishable in accordance with law. This Article came into force with effect from 26th January, 1950. In and after 1950, no 'law' was promulgated to punish the persons who practice untouchability. The Legislature realized the lacuna and came up with 'The Untouchability (Offences) Act' in 1955. Neither Article 17 nor the 1955 Act had any impact on the pernicious practice of untouchability which is rampant in every nook and corner of Hindu society. Since there was no significant change, the Legislature brought out another statute and rechristened the 1955 Act as 'The Protection of Civil Rights Act', in 1976. Though there was a change in the nomenclature, there was no change in the malignant attitude of caste Hindu society. In addition to the practice of untouchability, atrocities were piling up on the members of the Scheduled Castes in the name of untouchability. Then the Legislature came up with another piece of Legislation by name 'The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act' in 1989. This Act has also not produced any salutary effect. There is a direct relation between Article 17 and the word 'Fraternity' in the Preamble. 'Fraternity' is to assure the dignity of the individual. This Article and Article 22, whereunder trafficking in human beings is prohibited and forced labour is made punishable, declare such acts as offences in the Constitution itself. By giving constitutional sanctity, they are declared as different from other offences which are notified under a penal law. However, in practice, the dignity of the individual has not been restored yet.

Freedoms

Another important right included in the Fundamental Rights is the right to Freedom incorporated in Article 19. As a matter of fact, Right to Equality (Article 14), Right to Freedom (Article 19), Right to Life and Personal Liberty (Article 21) are the most crucial Rights guaranteed by the Constitution. Whereas, Article 14 and Article 21 guarantee these rights to 'any person', Article 19 guarantees the right to freedom to only citizens of India. These three rights encompass the whole gamut of human existence. The broad spectrum takes into its fold all aspects of human life. Hence, the importance of Article 14, Article 19 and Article 21.

Originally, seven freedoms were guaranteed under Article 19. In short, they were: freedom (i) of speech and expression, (ii) to assemble (iii) to form associations (iv) to move freely (v) to reside and settle anywhere (vi) to hold property and (vii) to practice any profession. By the Constitution (44th Amendment) Act, 1978, the right relating to property was omitted. This was necessitated in order to bring land legislation in the process of building a socialist State. These freedoms are regulated by imposing reasonable restrictions on the exercise of the right under Clause (2) of Article 19. Though these freedoms are grouped in Clause (1) of Article 19, the restrictions are made different to each of the freedoms, specifying the purpose for imposing restrictions on the exercise of each of the individual rights. These purposes were also introduced at different stages according to the necessities of the State by Constitution (1st Amendment) Act, 1951, 16th Amendment Act, 1963 and 44th Amendment Act, 1978. The very first amendment to the restrictions was brought in 1951 itself, keeping the interests of sovereignty and integrity of India, etc. in view.

The Supreme Court, in the beginning, viewed the fundamental rights in an orthodox way. The attitude was expressed in its first major pronouncement in the *A.K. Gopalan v. State of Madras* (1950) case. These rights were made available only to free citizens. The Supreme Court held:

"...Having specified the rights, each of them is considered separately from the point of view of a similar right in the other citizens, and also after taking into consideration the principle that individual liberty must give way to the extent it is necessary when the good or safety of the people generally is concerned..." It further says, "... Liberty has to be limited in order to be effectively possessed. Accordingly, Article 19 while guaranteeing some of the most valued phases or elements of

liberty to every citizen as civil rights, provides for their regulations for the common good by the State imposing certain restrictions on their exercise..." The Supreme Court also made it clear that "... none of the seven rights enumerated in Clause (1) is an absolute right, for each of these rights is liable to be curtailed by laws made or to be made by the State to the extent mentioned in clauses (2) to (6) of that Article. Those clauses save the power of the State to make laws imposing certain specified restrictions on the several rights..."

In relation to the first freedom of speech and expression, the Supreme Court gradually expanded its scope and included within it various facets of freedom of speech and expression. The Supreme Court held in several decisions that the freedom of speech and expression includes right to acquire information and to disseminate it. Freedom of speech and expression is necessary for self-expression which is an important means of free conscience and self-fulfillment. The freedom of speech and expression includes freedom of press. The freedom of the press in turn includes right to circulate and also to determine the volume of such circulation. It also includes the right to communicate. The Supreme Court in the *Brij Bhushan and Another v. The State of Delhi* (1950) case reminds you of the duty of the courts in the case of fundamental rights. It says:

"...Freedom of speech and expression is one of the most valuable rights guaranteed to a citizen by the constitution and should be zealously guarded by courts..." With reference to the reasonable restrictions imposed upon the exercise of those fundamental rights, the court says that "... the Constitution itself has prescribed certain limits for the exercise of the freedom of speech and expression and this Court is only called upon to see whether a particular case comes within those limits."

The Supreme Court in the *Madhu Limaye v. The State of Maharashtra* (1977) case was not prepared to hold that the First Amendment was either not valid or not retrospective. The accepted fiction in the first amendment is to make the constitution be read with the new clause and no other and a law restricting the freedoms in the interests of public order (or in the interests of the general public) must be held to be saved, not as a result of amendment, but because these available restrictions were operating from the inception of the Constitution.

Since the freedom of speech and expression is regulated by imposing reasonable restrictions, by and large, the Supreme Court approved

the restrictions. It was more interested in the reasonableness of the restrictions. It cautioned that the restrictions should not swallow the very freedom. The court approved all facets of the speech and expression and its multiplication both through print and electronic media, films etc.

The right to form associations or unions is a fundamental right. The necessity to form unions is obviously for voicing the demands and grievances of labour. The Supreme Court accepted that "... trade unions with sufficient membership strength are able to bargain more effectively with the managements. This bargaining power would be considerably reduced if it is not permitted to demonstrate. Strike in a given situation is only a form of demonstration..." The right to demonstrate and therefore, the right to strike is an important weapon in the armoury of the workers. This right has been recognized by almost all democratic countries. Though not raised to the high pedestal of a fundamental right, it is recognized as a mode of redressal for resolving the grievances of workers. But the right to strike is not absolute under our industrial jurisprudence, and restrictions have been placed on it. As a matter of fact, it is an established fact that no fundamental right is absolute. Earlier also, in the All India Bank Employees case, the Supreme Court held that "...even a very liberal interpretation of Article 19(1)(c) could not lead to the conclusion that trade unions have a guaranteed right to an effective collective bargaining or to strike either as part of collective bargaining, or otherwise..."

The right to strike is recognized under the Industrial Disputes Act. The workers can resort to strike having exhausted all other conciliatory steps in getting redressal to their grievances, by giving a statutory notice to strike. It is a different aspect if the strike is declared illegal by the Government. In such circumstances it is very unfortunate if the Supreme Court declares that resorting to strike is unconstitutional. It is tantamount to denying trade unions their resort to group activity which was earlier recognized when their union was registered. It also scuttled a universally accepted labour practice. The whole international labour movement was developed through strikes.

Similarly, the Supreme Court rendered another decision in the CPI case, wherein calling for a 'bandh' is held to be violative of fundamental rights. It went against a democratic political activity. The Supreme Court endorsing the judgment of a Full Bench of Kerala High Court held that "...calling for, holding of and enforcing 'bandh' by political

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parties, organized bodies or associations is violative of fundamental rights of the citizens in addition to causing national loss and hence, declared unconstitutional and illegal." It further proceeded to direct the Government to take steps to recoup the loss from the sponsors and organizers of such 'bandhs'..". By this judgment, the Supreme Court took upon it a legislative duty and promulgated a law holding 'bandhs' as unconstitutional and made it an offence for which the organizers had to pay compensation. The court interestingly admits that there is no definition of the word 'bandh'. It also admits that there is no law declaring 'bandh' as either illegal or unconstitutional.

It is to be noted that the Supreme Court or any other court cannot legislate. It can declare a law made by the Legislature either invalid or unconstitutional. The House of Lords in the *Duport Steels Ltd. & Others v. Sirs and Others* (1980) case said in the context of separation of powers: "... The Judges' duty is to interpret and to apply the law and to change it to meet the Judges' idea of what justice requires...". In the words of Chief Justice Taney of U.S.A "... the province of the court is to expound the law, not make it..." (cited in Swindler, 1970, p. 671). Willian Gangi (1993) said in such a context "... Judges have no particular expertise regarding public policy options other than that possessed by elected and accountable representatives...".

Right to Travel and Personal Liberty

(From Gopalan to Maneka via Kharak Singh and Cooper)

The right to travel has become a much contested right in the Courts. Since a citizen can challenge any executive action depriving him the enjoyment of any of the fundamental rights on grounds of unconstitutionality, much debate has gone on in the courts regarding the right guaranteed under Article 19(1)(d). This right is again controlled by reasonable restrictions to be imposed under Article 19(2)(5). Though initially the courts started considering the fundamental rights and their deprivation or reasonable restriction in isolation, later they started viewing these rights in conjunction with Articles 14, 19 and 21. As a result, the right to travel is to be appreciated along with the right to personal liberty. The law in this regard has also travelled a great distance.

In the beginning of the Constitution, this right was tested in the *A.K. Gopalan v. The State of Madras* (1950) case. This case relates to preventive detention. The sum and substance of the Gopalan case is that the State can validly put a citizen under preventive detention in accordance with a law in that regard, and then such person loses his rights guaranteed under Article 19 i.e. the celebrated six freedoms. The court cannot examine the justifiability or otherwise of such law. They have to examine whether there is any law in force empowering the State to keep a person in preventive detention, temporarily depriving such person from moving from one place to another and whether that is legally done and nothing more. If the preventive detention is under Article 22, then the court would not examine whether such law is valid on the touchstone of Articles 14, 19 and 21. The decision in the A.K. Gopalan case hands out a theory that the freedoms under Article 19, 21, 22 and 31 are exclusive, each Article enacting a code relating to the protection of distinct rights. A.K. Gopalan, a Member of the Lok Sabha from the undivided Communist Party of India, was not allowed to visit Russia in the year 1950 and was placed in preventive detention. When his detention was challenged, the Supreme Court held that since his detention is under a valid law, his

other right, of travel, was also taken away by the order of detention. All his fundamental rights are suspended. The court further said it cannot decide whether the order of detention is valid or not since the said detention was made under a valid law. The result is that his fundamental rights were eclipsed. The court also said that the right of movement is guaranteed only in the territory of India, meaning to say that right of movement outside India is not covered.

This interpretation was slightly changed in the *Kharak Singh v. The State of U. P. & Others* (1962) case. In this case, the court took a view that personal liberty is used in the Article as a compendious term to include within itself all the varieties of rights which go to make up the personal liberties of man other than those dealt with in the several clauses of Article 19(1). The narrow interpretation given in the Gopalan case with relation to the personal liberty was rejected in the *R.C. Cooper v. Union of India* (1970) case. This decision was rendered by 11 judges to the effect that the fundamental rights conferred by Part III are not distinct and mutually exclusive rights. Each freedom has different dimensions and merely because the limits of interference with one freedom are satisfied, the law is not freed from the necessity to meet the challenge of another guaranteed freedom.

This decision points out that Part III of the Constitution weaves a pattern of guarantees on the texture of basic human rights. The guarantees delimit the protection of those rights in their allotted fields. The effect is that where a person is detained in accordance with the procedure prescribed by law, as mandated by Article 21, the protection conferred by the various clauses of Article 19(1) does not cease to be available to him and the law authorizing such detention has to satisfy the test of the applicable freedoms under Article 19(1). This would clearly show that Article 19(1) and 21 are not mutually exclusive, for if they were, there would be no question of a law depriving a person of personal liberty within the meaning of Article 21 having to meet the challenge of a fundamental right under Article 19(1). It was further clarified that the expression 'personal liberty' in Article 21 is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of a man and some of them have been raised to the status of distinct fundamental rights and given additional protection under Article 19.

The right to movement or the right to go abroad is further extended in the *Maneka Gandhi v. Union of India*, (1978) case. This was rendered

by seven judges. The law relating to 'law', particularly that law which either curtails, restricts or takes away any fundamental right is expanded to a great extent, in opposition to arbitrariness and importing fairness into the said 'law'. An expanded meaning to the expression 'procedure established by law' is given by eliminating arbitrariness and importing justice and fairness. Both the Gopalan and Maneka Gandhi cases dealt with the right to go abroad. In both cases, the Supreme Court held that Article 19(1)(d) guarantees only the right of movement in the territory of India and it does not guarantee right to travel abroad. But when, once the right to travel is refused by a valid law, as in the Gopalan case, the court was satisfied about the existence of a law. It was not inclined to examine whether the law was fair or just. When the Union of India was not inclined to allow Gopalan to go to Russia, they put him under preventive detention under a valid law. By refusing to allow him to go to Russia, the complaint of Gopalan was that his right to freedom of speech and expression was also curtailed. The Court rejected his plea on the ground that both the rights which are guaranteed under Article 21 and Article 19 are distinct and separate and one cannot be fused into another and so appreciated.

In the Maneka case, the Supreme Court, accepting the march of R.C. Cooper, held that Articles 21 and 19(1) have to be read together and what has to be decided is the end result of the State action by rejecting the right to travel in the light of both Articles 21 and 19(1) together but not in isolation. Maneka Gandhi's passport was impounded under the Passports Act, 1967. By this she was prevented from going abroad. She was also a Member of Parliament. Her main grievance was that before impounding her passport, she was not provided with an opportunity to be heard, and hence, it was violative of principles of natural justice. The Supreme Court, dealing with personal liberty held that [Gandhi 1978] "... if a law depriving a person of 'personal liberty' and prescribing a procedure for that purpose within the meaning of Article 21 has to stand the test of one or more of the fundamental rights conferred under Article 19 which may be applicable in a given situation, *ex hypothesi* it must also be liable to be tested with reference to Article 14."

The specific extension of the law in this case is the primacy to test the 'law' by which a citizen's right is either restricted or taken away, and to test whether it is 'right or fair or just'. On natural justice, the Supreme Court said that it is a great humanizing principle intended to invest law with fairness and to secure justice and over the years it has

grown into a widely pervasive rule affecting large areas of administrative action. In this context only, the Supreme Court reiterated its view on Article 14. It says that [Gandhi 1978] "Article 14 is a founding faith of the Constitution. It is indeed the pillar on which rests securely the foundation of our democratic republic and, therefore, it must not be subjected to a narrow, pedantic or lexicographic approach. No attempt should be made to truncate its all embracing scope and meaning, for to do so would be to violate its magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire limits." A similar tone was heard in the *E. P. Royappa v. State of Tamilnadu & Another* (1973) case, when the Supreme Court said that "...from a positive point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies, one belongs to the rule of law in a republic, while the other to the whim and caprice of an absolute monarch." Interjecting the aspect of arbitrariness as against the concept of equality, in fact, in subsequent times, helped the citizens in challenging executive and administrative actions and obtaining relief in the realization of fundamental rights.

The right to acquire and hold property was omitted by Constitution (44th Amendment) Act, in 1978. Article 19(1)(g) guaranteed the right to acquire, hold and dispose of property. The Supreme Court in the *Kesavananda Bharati v. State of Kerala* (1973) case held that "... The framers of the Constitution regarded the right to acquire and hold property as a Fundamental Right for the reason that a dignified human life is impossible without it." It further says that "... the most we can claim, as a general principle, applicable to all stages of social development, is that without some property or capacity for acquiring property, there can be no individual liberty, and that without some liberty there can be no proper development of character. Persons without property enjoy no sense of background such as would endow their individual lives with a certain dignity."

Holding this right in a country where in a majority of people are landless or propertyless and are dependent upon wage labour is nothing but a travesty of justice, and an anathema. This also contradicts the lofty objectives in the Preamble. Unfortunately, the payment of Privy Purse to ex-rajahs and maharajas was also considered to be a property. This concept of right to property as a fundamental right also runs against Directive Principles. When the Executive was contemplating the enforcing of land reform legislations in different States, it found this right as a roadblock.

As long as this right is available in Article 19(1)(f), the courts would be in support of the said right, and as such, it became inevitable for the Parliament to omit the said right from Article 19(1), and by the Constitution (44th Amendment) Act, 1978, this right was omitted. Henceforth the right to property is no more a fundamental right but remains as a constitutional right. The right to property is omitted, no doubt, but by that there is no further attempt to provide the millions of people who do not possess an inch of land either to cultivate and lead a dignified life or to take shelter. The lofty goal of alleviating people from poverty is still a mirage.

Right to Life

Article 21 which mandates that 'no person shall be deprived of his life or personal liberty except according to procedure established by law' is a great protection given not only to the citizens of this country, but to every person living in this country either temporarily or permanently. This right is as extensive and diverse as life is and covers all its facets. This is one of the branches of Constitutional law which was very widely expanded and is being expanded. Though initially the courts were a little hesitant, and satisfied with giving a narrow interpretation of the word 'life' and the phrase 'personal liberty', later, it came up with a very broad concept and enriched the definition of life and personal liberty in tune with the philosophy of the Constitution. It received assistance, in the process, not only from the Preamble and the fundamental rights but also from directive principles. In fact, in unfolding the meaning of life, it practically read the non-justiciable directive principles into fundamental rights and adorned the 'life' and 'personal liberty' with other reinforcements. This is a great guarantee against the unguided, unbridled and uncontrolled police powers which were inherited from the colonial past. It is a controlling line between a police State and a democratic State. A great divide between an oppressive State and a welfare State. It is a protection or shield against the repressive attitude of the State in the name of maintaining law and order, against taking away the lives of people without any respect to the laws promulgated. This Article attains primacy over other fundamental rights in the sense that it safeguards the 'very life', whereas the other rights come to the aid when life does not flicker away. The other rights blossom when the right to life is preserved. Hence its primacy.

Unfortunately, this right to life is much abused and trampled upon by the State. Almost all actions of the police in depriving the people of life and personal liberty go unnoticed by the agency of law and unpunished by the courts. The violations of this fundamental right go on with impunity. In the name of curbing violent or extremist activity, several thousands of people in this country are shot dead in blatant violation of law. People are picked up from their homes, working places, or educational institutions and shot dead. Several people are picked up in normal course as a measure of 'interrogation', irrespective of whether they are involved in any crime or not, or whether there is any allegation or not, and tortured and killed. Several people are now shown as missing. Their parents are not aware of the whereabouts of their sons and daughters. Some are still waiting for their return. Several thousands of people are lifted from their homes, right in front of their parents or relatives or neighbours and are either brought back dead or informed that they are dead, no reasons forthcoming. No one dare question the acts of the police out of fear that the same act may be repeated in their case. Several thousands of people are tortured in police lock-up and killed, and later shown as cases of suicide. Robbers, petty thieves, gangsters and several such people are just killed and a section of the society is brainwashed to a level that they believe that such people deserve such deaths. People are slowly becoming immune to such brutalities.

The expression 'no person' found in Article 21 includes thieves, robbers, dacoits, unsocial elements, naxalites or extremists. The law does not distinguish but the police always do. The bonded labourers, the captive families in the brick-kilns, the semi-slaves labouring in the field, the forced women submitting their bodies silently and in agony in the dark dungeons of human depravity, are not aware that there is a law protecting their lives and personal liberties. The law has not extended its protective arm towards such hapless creatures. Even after so many years of the Constitution the strong-arm State has not shown any respect for the life of people and several thousands of people are gunned down in the streets like dogs. The Constitution does not grant any immunity to the State in such actions. The situation in the north-eastern States and in areas where Maoists or naxalites work among tribals and the poor is appalling. There is no law or procedure followed by the police in those areas when they indulge freely in killing people, raping women and destroying their habitations.

Now after decades of the Constitution, a war-like situation is prevalent in some parts of the country between armed police and the people supposed to be sympathisers of Maoists. The right to life of the tribes is being trampled under the guise of flushing out Maoists. The State, which abdicated its duty to look after the needs of the people, their living conditions, which failed to provide education, health, employment and other necessities, which could not identify the place of residence of the tribes in the map of India, where its surveyors could not enter the area to locate it, is now sending its armed forces and driving the people away from the forest, and scorching their villages, intending only to allow multinational companies and their cohorts to plunder the rich minerals available in plenty in those areas. This is the guarantee the State is offering to the Adivasis. This demonstrates that the State action is in contradiction with its Constitutional obligations.

In the *State of Orissa v. Dr. (Miss) Binapani Dei and Others* (1967) case, the Supreme Court held that "... It is one of the fundamental rules of our Constitutional setup that every citizen is protected against exercise of arbitrary authority by the State or its officers. Duty to act judicially would, therefore, arise from the very nature of the function intended to be performed... If there is power to decide and determine to the prejudice of a person, duty to act judicially is implicit in the exercise of such power." This is as far as natural principles of justice are concerned. In the Shambunath case also it was held that "... a law of preventive detention has to meet the challenge not only of Articles 21 and 22 but also of Article 19(1)(d)."

The *Additional District Magistrate, Jabalpur v. S. S. Shukla* (1976) case is considered to be a distortion of law. With a majority of 4:1, the Supreme Court rendered a judgment which was not in consonance with the philosophy of the Constitution. This Judgment was rejected in the Maneka Gandhi case. There was a lone dissenting voice which tried to uphold the constitutional objectives, more particularly the right to life, and ultimately, the learned Judge had to pay the price. His dissent incurred the wrath of the Executive and the lone Judge had to lose his legitimate right to become the Chief Justice of India.

Those were the days of the Emergency. Several authorities and institutions were brought to their knees. Several thousands of citizens were put in jails by an executive order under the Maintenance of Internal Security Act, 1971. Every person in administration toed the line of the dictator

and principles of fairness in administration were totally sacrificed. In such circumstances, the judgment in the A. D. M Jabalpur case also gave an indication of the minds of citizens that "Alas! The Supreme Court has also fallen in line..." The majority held to the opinion that: "In view of the Presidential Order dated 27th June, 1975, no person has locus standi to move writ petition under Article 226 before a High Court for habeas corpus or any other writ, order or direction to enforce any right to personal liberty of a person detained under MISA on the grounds that the order of detention or the continued detention is for any reason not under or in compliance with the Act or is illegal or malafide or is based on extraneous consideration..." (*Additional District Magistrate, Jabalpur v. S. S. Shukla,* 1976).

In view of the Presidential Order, no person could approach the courts challenging the deprivation of his personal liberty if detained under the Maintenance of Internal Security Act (MISA) and that in view of the enforcement of MISA and promulgation of emergency, the fundamental rights were suspended and the citizen had no right to seek a direction from the court to allow him to enjoy his fundamental rights and further that the detenue has no right to ask for the grounds of his detention and that the courts are debarred from verifying whether the order is passed with any malafide intention and that the order was passed by the detaining authority without satisfying himself of the necessity of passing such order. This decision closed the doors of the court to enforce one's fundamental rights and deprived the citizen of other fundamental rights guaranteed to him under other articles. This decision was of course short-lived as it was overruled by another decision rendered in the Maneka Gandhi case.

On the whole, the right to life and personal liberty was restricted in the beginning, but later the court went on expanding the right to a great extent. But the courts did not recognize the right to work as a fundamental right. The court ignored the hard reality of life that unless a person works, he cannot maintain himself and enjoy his personal liberty. An opportunity to work is to be provided by some agency either private or public. The courts have taken special care to protect the environment but not the life of the citizen. Right to education is just recognized as a fundamental right but only in case of children aged between 6 and 14. Both work and education help a person to live like a human being and also in developing his or her personality. He can comprehend the meaning of life. The Supreme Court held, as compactly noted by Durga Das Basu,

that life or personal liberty includes a right to live with human dignity. It also held that right to life means something more than survival or animal existence. It would include the right to live with human dignity. It would include all those aspects of life which go to make a man's life meaningful, complete and worth living. The right to life guaranteed under Article 21 of the Constitution embraces within its sweep not only physical existence but also the quality of life. Right to water is a right to life and thus a fundamental right. The right to access drinking water is fundamental to life and it is a duty of the State under Article 21 to provide clean drinking water to its citizens. It would include all that gives meaning to a man's life e.g., his tradition, culture, heritage and protection of that heritage in its full measure. It would thus include the right of a person not to be subjected to bonded labour or unfair conditions of labour. Right to a decent environment is also included in the right to life. Right to good health is included in the said right. Right to bare necessities of life such as adequate nutrition, clothing, shelter over the head, facilities for reading, writing, interviews with members of his family and friends are recognized as rights of the prisoner. But these rights are subjected to Prison Rules. Right to livelihood is also guaranteed under Article 21.

The Supreme Court held that women should be treated with decency and proper dignity and the search of a woman by a person other than a female officer is violative of the fundamental right to life. Some more rights were declared as inclusive of right to life by the Supreme Court. The notable ones are right to go abroad, right to privacy, right against solitary confinement, right against bar fetters, right to legal aid, right to speedy trial, right against handcuffing, right against delayed execution, right against custodial violence, right against public hanging, right to doctor's assistance, right to shelter, right to health and medical aid of workers, right to social justice and economic empowerment. But it is very sad to note that the right to work is not included in this long list.

In this context, it is very commendable on the part of the Supreme Court in conferring on SOME OF the directive principles a status of fundamental rights. One such right is environmental protection, and another, the right to primary education. The unlimited powers given to Special Armed Police, to shoot and kill unarmed people are not disapproved by the Supreme Court, though untrammeled power is opposed to the right to life.

It is interesting to note that most of the rights are read into the right to life under Article 21, when rich and influential people are involved. The right to life is enlarged in case of Maneka Gandhi. Right to silence is recognized in case of Nandini Satpathy, a former Chief Minister of Orissa. Likewise, prisoners' rights are expanded in similar circumstances. No doubt in such cases, the Supreme Court did not discriminate between a so called respectable person in society or so called anti-social element. Maybe, the Supreme Court renders its judgment when a complaint is brought before it. Only rich people can approach the Supreme Court with a complaint of constitutional violations. The workers, pavement dwellers, slum-dwellers, the Tribes and Scheduled Castes are not in a position to approach the Supreme Court even when their fundamental rights are being trampled upon day in and day out. Fortunately, for such people, the device of Public Interest Litigation (PIL) has come to their rescue. In very few cases, they could get their grievances exposed by some agencies or individuals who are sympathetic to their cause. The leading instances are the Bandhua Mukti Morcha, Olga Tellis and Bhopal Gas.

Article 23 prohibits traffic in human beings and forced labour and Article 24 prohibits employment of children in factories. This part of the fundamental rights remained unattended to for almost three decades after the enforcement of the Constitution. The traffic in human beings, obviously including traffic in women and children, is very much rampant in this country, including both 'begar' and 'vetti'. The State simply allows these things to happen and the fundamental rights recognized in these two articles are almost reduced to the state of pious declarations.

It only shows the antipathy of the State. Article 23 not only prohibits 'begar' or forced labour, but also makes the contravention of this provision an offence punishable under law. But again the Parliament did not come up with any legislation to punish the violators till 1976, when the Bonded Labour (Abolition) Act was promulgated. At least to punish the offences under untouchability, the Parliament made a law in 1955 and another in 1976 and in 1989, but the aspect of bonded labour was left to its fate till 1976. The courts intervened only in 1982 and 1984 in the case of PUDR and Bandhua. In both cases, voluntary organizations approached the Supreme Court and obtained very progressive judgments. This did not happen in the matter of trafficking in human beings, particularly women. Again it took almost three decades to prohibit Devadasi system by bringing Jogini (Abolition) Act, 1976.

Employment of children is a notorious practice in this country. Due to conditions of poverty, some parents often force their children at a very tender age to work, even for a pittance. Several industries flourish by employing children. Not only in industries but also in hotels, restaurants, residential houses, shops and such other business houses, and in brick-kilns, cement factories, agricultural fields and operations, children are employed. The Constitutional prohibitions do not come to their rescue. It should be considered a crime against humanity and civilization, when children who are supposed to attend schools, learn and play, are labouring under inhuman conditions, just to satiate their hunger or augment their parents' meager income. This is an unredeemable cost the nation is paying all through the post-independence years. The authorities are not paying any attention to the directives issued by the Constitution in relation to the health, education and safety of the children. Not only are the directives ignored by the successive Governments, but even the judgments of the Supreme Court to the effect that "... the State should not only identify bonded labourers but also provide for their rehabilitation and failure to do so would constitute a violation of Articles 21 and 23" are ignored.

The Right to Freedom of religion and right to manage religious affairs are guaranteed in Articles 25 and 26. They relate to freedom of conscience and profession and practice and propagation of religion and freedom to manage religious affairs. These rights are enumerated and incorporated in Articles 25 and 26, probably to give effect to 'Liberty of thought, expression, belief, faith and worship' which are promised in the Preamble. Since the Preamble is not an essential part of the body of the Constitution, the 'Liberty' which was promised in the Preamble is translated into specific rights and included in Articles 25 and 26. In order to make them fundamental as well as guaranteed, they were included in the Chapter on Fundamental Rights. Like other fundamental rights, the Constitution permitted the State to regulate the religious practices in the interests of public order, morality and health. The Right to manage their own affairs is also guaranteed, again subject to State regulations. The right to freedom of conscience and right to freely profess, practice and propagate any religion are not only guaranteed to the citizens but to all persons residing in this country. Generally, religion is confined to the individual, similar to faith and belief. But the right to propagate involves a group, which may extend to several thousands. This right ordinarily appears at first blush as only a religious practice, but has a tendency to flare up as communal tensions and clashes which this country

is experiencing and bearing the brunt of. Instead of incorporating this right as a fundamental right, the Constitution makers should have left it for the State to regulate it as a statutory right. This assurance as a fundamental right has led to many gory instances which have surpassed all earlier violent incidents. The demolition of Babri Masjid, and the Delhi and Gujarat carnages are shameful incidents.

Similarly, the right to maintain their own affairs led to a sort of allowing a monopoly in the field of education and educational institutions. In spite of the existence of these two rights as fundamental ones, the State in 1977, inserted the word 'secular' in the Preamble by way of the Constitution (42nd Amendment) Act, 1976. When the Constitution was being debated, the members considered the use of the word 'secular' but felt it to be unnecessary, since the concept was protected by other Articles of the Constitution. Probably to give an emphatic expression to the freedom of religion and to maintain religious affairs, the word 'secular' was added.

Most of the State Governments are being headed by persons having faith in 'Hindu' religion, and there is every chance of them giving priority to that religion, in spite of the secular character of the State. In some States, the situation has grown to the extent of performing 'poojas' at the time of the Chief Minister and other Ministers taking charge of their offices and occupying their official chambers. Similarly, auspicious timings otherwise called as 'muhurtams' are chosen when any foundation to any State construction is started or launched. Scenes of half-clad Brahmins blessing the dignitaries at such and other State functions are mostly visible. These things are not only opposed to the secular character of the State, but also offend the human dignity and the sentiments and feelings of others, both practitioners of any other religion and non-practitioners as well. This dichotomy should be cleared as early as possible, otherwise the State is likely to slide down into the quagmire of irrational and blind beliefs.

It can be safely said that the right to maintain their own religious institutions and to start educational institutions, does not serve any useful purpose both to majority and minority sections of the society. On the other hand, it has encouraged not only a monopolistic trend but also a divisive pattern. The large religious institutions which have increased enormously, do not serve the peoples' cause. These rights, which are otherwise also guaranteed in Article 19 and affirmed in the

Preamble, can allow the citizen, as an individual, to lead a religious way of life, but the whole trouble begins when the same rights are recognized as a group rights, be it of majority or minority. Though the State may not encourage the majoritarian belief and practice, its functionaries, including those in scientific and technological fields, do encourage the same. This is against the constitutional philosophy.

Regarding the right to property, much debate went on in the Constituent Assembly. Moving the relevant Article, the Honourable Jawaharlal Nehru, in the Assembly, for consideration, made a very fervent and passionate speech regarding the right to property and the changes that were taking place from time to time in different countries and urged the House to take an approach to property, keeping the needs of the people through changing times. It is interesting to note some of the points he touched upon. He gave an assurance in the beginning that "... let us be quite clear that there is no question of any expropriation without compensation so far as this Constitution is concerned..." Visualizing a conflict between the interests of individual and the Nation, Nehru said "... No individual can override ultimately the rights of the community at large. No community should injure and invade the rights of the individual unless it be for the most urgent and important reasons..." Finally he added that "... It is a just compromise and it does justice and equity not only to the individual but to the community..." He drew the attention of the House reminding the members that: "... very conception of property which may seem to us an unchanging conception, but which has changed throughout the times and changed very greatly and which is today undergoing a very rapid change... Gradually, the idea of property underwent changes, not so much by law but by the development of human society..." He cautioned the House "... to keep in mind the transitional and revolutionary aspects of the problem, because when you think of the land question in India today, you are thinking of something which is dynamic, moving, changing and revolutionary..." Forecasting probably a roadblock which could be placed by the Supreme Court, Nehru exhorted.. "... No Supreme Court and no judiciary can stand in judgment over the sovereign will of Parliament representing the will of the entire community. If we go wrong here and there it can point it out, but in the ultimate analysis, where the future of the community is concerned, no judiciary can come in the way..."

In spite of the above assertion, a war of words went on between the Executive and the Judiciary in the matter of acquisition of property,

the procedure adopted and the quantum of compensation to be paid to the owner of the property. There was also a debate in relation to the definition of 'public property'. There were clashes regarding fixation of the amount to be paid, whether it was just compensation or if it should be the market value. Ultimately, it settled on market value. If the amount to be paid is the market value of the property, it amounts to a sale and purchase, but not acquisition.

Prior to the advent of the Constitution, there was a law on this subject called 'The Land Acquisition Act, 1894' enacted by the British Government. The same is continued even after Independence and the advent of the Constitution. There is not much change in the law, except in details or procedure and fixation of the amount to be paid. The acquisition by the State since then is being questioned in courts and most of the judgments went in favour of the propertied class. Ultimately, the very right to property, which is included in the Fundamental Rights, was repealed by the Constitution (44th Amendment) Act, 1978. Another Article relating to 'Saving of Laws' providing for acquisition of Estates, etc. was replaced by the Constitution 1st, 4th, 17th and 44th Amendment Acts, 1951, 1955, 1964 and 1978 respectively. Thus the Constitution had to be amended four times to overcome the difficulties of judgments in matters of acquisition of estates, etc. Now the said right is embedded in the Constitution as a right recognized under Article 300A, but not as a fundamental right under Chapter-III.

Approaching the Supreme Court

After providing certain rights to citizens and some to persons with a necessary mechanism to regulate the enjoyment of those rights, in the interest of public as well as nation and its security, the Constitution provided for another right to move the Supreme Court whenever there is a violation of the fundamental rights under Article 32. The said Article provides a right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by Part IV (the Chapter on Fundamental Rights) is guaranteed. Under this Article a remedy is created so as to get the Fundamental Rights effectively implemented. The Constitution did not just create rights and leave it at that, but it also created a necessary mechanism for providing a remedy to the citizen whenever his or her Fundamental Rights are infringed upon. The Article has empowered the Supreme Court to issue directions or orders or writs, including writs in the nature of habeas corpus, *mandamus*, prohibition, *quo-warranto* and *certiorari*. The power to issue such directions is also endowed upon the High Courts under Article 226, but the right created under Article 32 gives a right to the citizen to approach directly the Supreme Court whenever there is a violation of the Fundamental Rights.

The above writs are adopted from the British Constitutional practice. Dr. Ambedkar explained this provision in the Constituent Assembly thus:

"...These rights have been in existence in Great Britain for a number of years... it was hardly possible to improve upon the writs which have been in existence for probably thousands of years and which have given complete satisfaction to every Englishman with regard to the protection of his freedom... The importance of these writs which are given by this Article lies in the fact that they are prerogative writs; they can be sought for by an aggrieved party without bringing any proceedings or suit..." (CAD 1948-12-09, 7.70.170).

Impressing upon the importance of this Article, Dr. Ambedkar again affirms, "...If I was asked to name any particular Article in this

Constitution as the most important – an Article without which this Constitution would be a nullity – I could not refer to any other Article except this one. It is the very soul of the Constitution and the very heart of it...." (CAD 1948-12-09, 7.70.172).

Referring to rights and remedies, particularly in the context of effective implementation of fundamental rights, Dr. Ambedkar, explaining why he preferred the British method of dealing with rights, said, "... British jurisprudence insists that there can be no right unless the Constitution provides a remedy for it. It is the remedy that makes the right real. If there is no remedy, there is no right at all, and I am not therefore, prepared to burden the Constitution with a number of pious declarations which may sound as glittering generalities but for which the Constitution makes no provision by way of a remedy. It is much better to be limited in the scope of our rights and to make them real by enunciating remedies than to have a lot of pious wishes embedded in the Constitution" (CAD 1948-12-09, 7.70.174).

This is about a remedy provided in the Constitution under Articles 32 and 226 for realizing the fundamental rights. How far the remedy worked is a question to be answered after decades of the performance of the Constitution. No doubt, a remedy is created for the realization of a right, but that remedy is beyond the reach of the common man, whose rights are either being denied or trampled upon by the Executive. The citizen has to approach either a High Court or the Supreme Court for a remedy. Both the institutions have remained far away and are not reachable for the common man, to whom the assistance of courts is most needed and essential. The oppressive costs, the exorbitant fee charged by Advocates, the robes, the unintelligible language, the lengthy procedures, the inordinate delays, the overawing atmosphere and the high domes and wide verandas really scare the common man and drive him away from the courts. The people who cannot afford to reach the High Court cannot be expected to approach the Supreme Court. Therefore, the Courts have become affordable to only the rich. Those who can meet all the requirements including the huge cost involved can alone make use of the Courts. Merely providing a remedy is not sufficient, if that is not available to the common man. In effect, it is almost no remedy at all. Even now justice remains a mirage for the masses of this country. In a real sense, the remedies prescribed in the Constitution for "...We the people", have become unavailable for those whom the Constitution was really meant. They are being snatched away by "...the

other people.." Even the people who are in the middle are also not in a position to make use of it.

Fortunately, the Supreme Court evolved a method by way of the Public Interest Litigation (PIL), so as to make the remedy available to the common man, the underprivileged, un-represented, the oppressed and suppressed, who are longing for justice since generations. The other two wings – the Legislature and the Executive – are already manned by the rich or their agents. The Legislature from the beginning is occupied and dominated by landlords and the otherwise rich. If the Constitution had not provided reservations for Scheduled Castes and Scheduled Tribes, there was no chance absolutely for the Scheduled Castes and Scheduled Tribes to be represented in the Legislature. Not only are the rich capturing the Legislature, it is also male dominated. The people who are at the helm of affairs and leading the political parties are not prepared to provide representation to women according to their population. The 'masculinity' of their class is not allowing even the rich women to have a share in political participation. Likewise, the Executive is represented by the same class. But for the reservations provided to Scheduled Castes and Scheduled Tribes in matters of education and employment, there was no chance for them to be found along with other sections in administration. This was the situation prevalent even before the advent of the constitution and the same is being continued till date.

Coming to the third wing – the Judiciary – it is the arbiter of the Constitution, the sentinel on the *qui vive*. It is meant to preserve and safeguard the Constitution. It is considered to be the protector and guardian of the Constitution. In substance, the Supreme Court is the ultimate repository of all judicial powers at the national level. It is also considered as the upholder and final interpreter of the Constitution and defender of the fundamentals of "the rule of law". As early as in 1950, the Supreme Court in the Anwar Ali case held that "...the foundations of the Republic have been laid on the bedrock of justice. To safeguard these foundations so that they may not be undermined by injustice occurring anywhere, the Supreme Court has been constituted. .." In the case of *Supreme Court Advocates-on-Record Association and Another v. Union of India* (1993) the Supreme Court affirmed that "... it is the cardinal principle of the constitution that an independent judiciary is the most essential characteristic of a free society like us..." How independent the judiciary is, is a moot question. The necessity of an independent judiciary, according to the Supreme Court, is to meet all

challenges, remain unbending before all authorities and to uphold the imperatives of the Constitution at all times.

Pandit Jawaharlal Nehru said:

"... It is important that these judges should be not only first-rate, but should be acknowledged to be first-rate in the country, and of the highest integrity, if necessary, people who can stand up against the executive government, and whoever may come in their way" (CAD 1949-05-24, 8.90.115).

Such are the sentiments expressed by the Drafting Committee regarding appointment of Judges both to the Supreme Court as well High Courts. They wanted first-rate persons in the country. In the beginning the majority of them were Brahmins, and the rest, belonging to castes in second or third rung in the ladder of the caste system. Even after so many years of completion of the Supreme Court, there is no visible change. Three or four of the top castes in the country are occupying the posts of Judges and the Chief Justice. Hardly a handful of Judges belonging to either Backward classes or Scheduled Castes are found in both the High Courts as well as the Supreme Court. The situation relating to Scheduled Tribes is more appalling. Hardly one or two Scheduled Tribe judges over the whole period are to be found. Similar is the case with women. The situation relating to minorities is a little better than the position of Scheduled Castes, Scheduled Tribes and Other Backward Classes and women. It took almost sixty years for a person belonging to Scheduled Castes to become the Chief Justice of the Supreme Court. Such is performance of the promise of equality and equal opportunities made in the Preamble.

Through all these years, the posts in the higher judiciary are being filled with persons belonging to higher castes, therefore, they are automatically supposed, in the Indian psyche, to be first-rate persons unbending or unyielding to any force, including the executive. This is not a comment on the performance of the Judges. It is stated with restraint, because, both the executive and the Judiciary are not willing to provide reservations to the Scheduled Castes, Scheduled Tribes and Other Backward Classes and women in the higher Judiciary. The demand is being rejected outright. The reason they show is that persons belonging to Scheduled Castes, Scheduled Tribes and Other Backward Classes, including women, are not yet fit to become Judges of either High Court or Supreme Court. It is

only an exception, they say, in the case of such persons already appointed. Unless one is made a Judge of a High Court, he or she cannot become a Judge of the Supreme Court. When the source is tightened, there is no chance to move up. Again, it is not a comment on the performance of the Judges, but only a reminder to the Nation, how those classes are being treated, in the name of merit and efficiency. It is on record that at least two Chief Justices of the Supreme Court lamented that there is corruption in the higher judiciary. There appeared some shadows on a handful of Judges of the Supreme Court including Chief Justices. The charges of corruption and other infirmities are now reaching the high dome of the Supreme Court. What happened to the talent? The merit? The efficiency? The first-rate? The higher born? It is high time that at least now, the authorities should take note that neither merit nor efficiency has anything to do with the caste of a person, but can be acquired provided opportunities are made available.

Yet another revelation is interesting. William Gangi (1993), quoting Grant Gilmore's conclusion in his book "The Ages of American Law,' states that 'realists' such as Cardozo sought to "..strip ... Judges of their trappings of black-robed infallibility and reveal ... them to be human beings whose decisions were motivated much by irrational prejudices than by rule of law..." (p. 98).

By keeping in mind the social background of the Judges, we can understand why in some particular cases, the interpretation of the Constitution is not uniform.

Yet the same Supreme Court opened the doors of justice in the *Bandhua Mukti Morcha v. Union of India and Others* (1983) case. Though there was an earlier occasion, in the Fertiliser Corporation of India case, where it intervened on behalf of labour, the Bandhua case stands aloft as an example when the Supreme Court freed bonded labourers from being trampled under the iron foot of unscrupulous employers. In the *S.P. Gupta v. Union of India and Others* (1981) (otherwise called the First Judges Case), the PIL further blossomed, but that case relates to appointment of Judges and was filed by a practicing advocate. In the Bandhua case, the Supreme Court said:

"... Public interest litigation is not in the nature of adversary litigation but it is a challenge and an opportunity to the Government and its officers to make basic human rights meaningful to the deprived and

vulnerable sections of the community and to assure them social and economic justice which is the signature tune of our Constitution.."

The litigation of this type particularly in relation to bonded labourers is really not in the nature of an adversary litigation and it becomes the duty of the State, and also of the appropriate authorities, to offer their best cooperation to see that this evil practice, which has been declared illegal, is ended at the earliest. The court further emphasized that "... it is intended to prosecute and vindicate public interest which demands that violation of constitutional or legal rights of a large number of people, who are poor, ignorant or socially and economically in disadvantaged position, should not go unnoticed, unredressed for that would be destructive of the rule of law" (*Forward Construction Co. and Others v. Prabhat Mandal (Regd.) Andheri and Others*, 1985).

In the *Vishaka and Others v. State of Rajasthan and Others* (1997) case, the Supreme Court affirmed that "... The obligation of the Supreme Court under Article 32 for the enforcement of the fundamental rights in the absence of legislation must be viewed along with the role of judiciary envisaged in the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA region..."The Supreme Court recognized the objective of PIL in the *Sheela Barse v. Union of India and Others* (1988) case: "... The compulsion for the judicial innovation of the technique of a public interest action is the Constitutional promise of a social and economic transformation to usher in an egalitarian social order and a welfare State...".

In the *Vineet Narain and Others v. Union of India and Another* (1997) case, the Supreme Court felt the need to issue directions against certain individuals, against whom charges of corruption were made and the Government was not initiating any process. It felt "... The need for a strong and competent prosecution machinery, and not merely a fair and competent investigation by the CBI can hardly be overemphasized." The Court felt that there must be a competent prosecution followed by a fair and competent investigation. The Supreme Court, in the *Indian Council For Enviro-Legal Action v. Union Of India And Others* (1996), intervened when the government did not act to curb pollution since "... their inaction is jeopardizing the right to life of the citizens in the country or of any section thereof..."

On an earlier occasion, in the *S.P. Gupta v. Union of India and Others* (1981) case, the Supreme Court laid down the parameters of the PIL: "... where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal provision or without authority of law or any such legal wrong or legal injury or illegal burden is threatened and such person or determinate class of persons is by reason of poverty, helplessness or disability or socially or economically disadvantaged position, unable to approach the court for relief, any member of the public can maintain an application for an appropriate direction, order or writ in the High Court under Article 226 and in the case of breach of any fundamental right of such person or determinate class of persons in the Supreme Court under Article 32, seeking judicial redress for the legal wrong or injury caused to such person or determinate class of persons." Placing some fetters, the court went further: "... But, the individual who moves the court for judicial redress in cases of this kind must be acting bona fide with a view to vindicating the cause of justice and if he is acting for personal gain or private profit or out of political motivation or some other oblique consideration, the court should not allow itself to be activised at the instance of such person and must reject his application at the threshold, whether it be in the form of a letter addressed to the court or even in the form of a regular writ petition filed in court ... The strict rule of standing which insists that only a person who has suffered a specific legal injury can maintain an action for judicial redress is relaxed and a broad rule is evolved which gives standing to any member of the public who is not a mere busybody or a meddlesome interloper but one who has a sufficient interest in the proceedings..."

In the *Dr. D.C. Wadhwa and Others v. State of Bihar and Others* (1986) case, a Professor of Political Science was permitted to file a writ petition for ensuring proper implementation of the Constitutional provisions.

In the *Janata Dal v. H.S. Chowdhary and Others* (1992) case the Supreme Court held that "... the Court should not allow its process to be abused by mere busybodies, meddlesome interlopers, wayfarers or officious interveners having absolutely no public interest except for personal gain or private profit either for themselves or as proxy of others or for any other extraneous motivation or for glare of publicity..."

This mode of approaching the Court for realization of fundamental rights was taken in almost all matters wherein the public at large is

involved. It ranged from labourers including bonded labourers and child labourers, commercial and communal matters, distribution of State largesse, environment and conservation of natural resources, forest use and encroachment, issues relating to health and healthcare, protection of the mentally and physically ill and handicapped, police atrocities, encounter killings, jail conditions, prisoners' rights, conditions for maintenance of public health, air pollution and water pollution, rehabilitation of the oppressed and weak, and the Bhopal Gas Leakage case. This branch of law has developed to commendable heights.

In public interest litigations, the Supreme Court rose to the occasion several times, zealously extending its judicial arm to the underprivileged and unrepresented. Yet, this facility was again utilized by rich people. In case of the poor and underprivileged, the Supreme Court no doubt displayed the full potential of the law, but at the time of granting final relief, it narrowed down its jurisdiction, and withdrew into its shell.

Directive Principles

Directive Principles enunciated in chapter IV are very essential for the purpose of governance. They are called Directive Principles of State Policy, also termed as "Instrument of Instructions". The Supreme Court in the *Kesavananda Bharati v. State of Kerala* (1973) case, said that "... Parts III and IV, which embody the Fundamental Rights and Directive Principles of State Policy have been described as the conscience of the Constitution. The Directive Principles of State Policy set forth the humanitarian socialist precepts that were the aims of the Indian social revolution... They were designated to be the chief instruments in bringing about the great reforms of the social revolution. They have helped to bring the Indian society close to the constitution's goal of social, economic and political justice for all..." It was further held that "... while most cherished freedoms and rights have been guaranteed the Government has been laid under a solemn duty to give effect to the Directive Principles. Both Parts III and IV, which embody them, have to be balanced and harmonized; then alone the dignity of the individual can be achieved. It was to give effect to the main objectives in the Preamble that Parts III and IV were enacted..." Noting the purpose for which the Directive Principles are enunciated, the Supreme Court said that "...The purpose of the Directive Principles is to fix certain social and economic goals for immediate attainment by bringing about a non-violent social revolution.... Without faithfully implementing the Directive Principles, it is not possible to achieve the Welfare State contemplated by the Constitution..."

The Supreme Court also termed the Directive Principles as "moral rights". The rights enumerated in Part III are fundamental whereas rights enumerated in Part IV are moral. The court further held that "... Therefore, the moral rights embodied in Part IV of the Constitution are equally an essential feature of it, the only difference being that the moral rights embodied in Part IV are not specifically enforceable as against the State by a citizen in a court of law, in case the State fails to implement its duty, but nevertheless, they are fundamental in the

governance of the country, and all the organs of the State, including the Judiciary, are bound to enforce those directives. The Fundamental Rights themselves have no fixed content, most of them are mere empty vessels into which each generation must pour its content in the light of its experience.... The significant thing to note about Part IV is that, although its provisions are expressly made unenforceable, that does not affect its fundamental character. Enforcement by a court is not the real test of a law. The Conventions of the English Constitution are not enforceable in a Court of law but they are, nevertheless, binding and form part of the Constitutional Law of the land. The similarity between the Constitutional Conventions in England and Directive Principles of State Policy in India cannot be disputed..."

This is broadly the view of the Supreme Court on the Directive Principles. Let us see what was the intention of the Drafting Committee and of the Members of the Constituent Assembly while incorporating these Directives in the Constitution. Dr. Ambedkar, dealing with a certain amendment to delete the word 'Directive', said:

"...With regard to the word "directive", I think it is necessary and important that the word should be retained because it is to be understood that in enacting this part of the Constitution, the Constituent Assembly, as I said, is giving certain directions to the future legislature and the future executive to show in what manner they are to exercise the legislative and the executive power, which they will have. If the word Directive is omitted, I am afraid, the intention of the Constituent Assembly in enacting this Part will fail in its purpose. Surely as someone have said, it is not the intention to introduce in this Part these Principles as mere pious declarations. It is the intention of the Assembly that in future both the Legislature and the Executive should not merely pay lip service to these Principles enacted in this part, but they should be made the basis of the Executive and Legislative action that may be taken hereafter in the matter of the governance of the country..." (CAD 1948-11-19, 7.56.26).

With an intention to clear the misunderstanding or rather inadequate understanding in the minds of the Members of the Constituent Assembly regarding the purpose as to which the Directive Principles are introduced in the Constitution, Dr. Ambedkar said:

"... our Constitution as a piece of mechanism lays down what is called Parliamentary democracy. By Parliamentary democracy, we mean 'one

man, one vote'. We also mean that every government shall be on the anvil both at its daily affairs and also at the end of a certain period when the voters and the electorate will be given an opportunity to assess the work done by the Government. The reason why we have established in this Constitution a political democracy is because we do not want to install by any means whatsoever a perpetual dictatorship of any particular body of people while we have established political democracy, it is also the desire that we should lay down a mechanism to enable people to come and capture power. The Constitution also wishes to lay down an ideal before those who would be forming the Government. That idea is economic democracy whereby, so far as I am concerned, I understand to mean 'one man, one vote'. The question is: Have we got any fixed idea as to how we should bring about economic democracy? There are various ways in which people believe that economic democracy can be brought about; there are those who believe in individualism as the best form of the economic democracy; there are those who believe in having a socialistic State as the best form of economic democracy; there are those who believe in the communistic idea as the most perfect form of economic democracy" (CAD 1948-11-19, 7.56.166).

Explaining why such deliberate language is used in the Directive Principles, Dr. Ambedkar further affirmed that:

"... In my judgment, the Directive Principles have a great value, for they lay down that our ideal is economic democracy. Because we did not want merely a parliamentary form of government to be instituted through the various mechanisms provided in the Constitution, without any direction, we deliberately included the Directive Principles in our Constitution. I think, if the friends who are agitated over this question bear in mind what I have said just now that our object in framing this Constitution is really two fold: i) to lay down the form of political democracy, and (ii) to lay down that our ideal is economic democracy and also to prescribe that every government whatever, it is in power, shall strive to bring about economic democracy, much of the misunderstanding under which most members are labouring will disappear" (CAD 1948-11-19, 7.56.168).

Explaining why the word 'strive' is used in the Directive Principles, Dr. Ambedkar said:

"... The word 'strive' which occurs in the Draft Constitution, in my judgment is every important. We have used it because our intention is

that even when there are circumstances which prevent the government or which stand in the way of the Government giving effect to the Directive Principles, they shall even under hard and unpropitious circumstances, always strive in fulfillment of these Directives. That is why we have used the word 'strive'. Otherwise, it would be open for any government to say that the circumstances are so bad, that the finances are so inadequate that we cannot even make an effort in the direction in which the Constitution asks us to go..." (CAD 1948-11-19, 7.56.169).

The purpose for which the 'Directive Principles' were incorporated in the Constitution, without, however, making any legal remedy available to the citizen in case the government does not follow the directives in the governance of the country, Dr. Ambedkar explained at length while moving the Constitution itself for consideration and adoption. He said:

"...In the Draft Constitution, the Fundamental Rights are followed by what are called 'Directive Principles'. It is a novel feature in a Constitution framed for Parliamentary Democracy. The only other Constitution framed for Parliamentary Democracy which embodies such Principles is that of the Irish Free State.

...

The Directive Principles are like the Instrument of Instructions which were issued to the Governor-General and to the Governors of the colonies and to those of India by the British Government under the 1935 Act...The inclusion of such instructions in a Constitution such as is proposed in the Draft becomes justifiable for another reason. The Draft Constitution as framed only provides a machinery for the government of the country. It is not a contrivance to install any particular party in power as has been done in some countries. Who should be in power is left to be determined by the people as it must be, if the system is to satisfy the tests of democracy. But whoever captures power will not be free to do what he likes with it. In the exercise of it, he will have to respect these instruments of instructions which are called Directive Principles. He cannot ignore them. He may not have to answer for their breach in a court of law. But he will certainly have to answer for them before the electorate at election time. What great value these Directive Principles possess will be realized better when the forces of right contrive to capture power..." (CAD 1948-11-04, 7.48.240, 7.48.242).

This explains in a better way as to why economic democracy has not so far established in this country, and Dr. Ambedkar threw a challenge that "... if and when the government ignores the Directives or refuses to implement the Directives, why the electorate is not able to punish the government which violates the Directives which are considered fundamental in the governance of the country..." The avowed object of establishing economic democracy in the country, for which the "Directive Principles" are enunciated and affirmed to be fundamental in the governance of the country, was earlier confirmed by Pandit Jawaharlal Nehru, when he introduced and initiated discussion on the Resolution relating to the Aims and Objects of the Constitution. He asserted:

"... We have given the content of democracy in this Resolution and not only the content of democracy but the content, if I may say so, of economic democracy in this Resolution. Others might take objection to this Resolution on the ground that we have not said that it should be a Socialist State. Well, I stand for Socialism and, I hope, India will stand for Socialism and that India will go towards the constitution of a Socialist State and I do believe that the whole world will have to go that way. What form of Socialism again is another matter for your considerations... Therefore, we have laid down, not theoretical words and formulae but rather the content of the thing we desire..." (CAD 1946-12-13, 1.5.17).

Keeping these elucidations and exhortations in mind, the "Directive Principles" were incorporated into the constitution. Before we consider what has been the attitude of the Supreme Court in interpreting the "Directive Principles" and what has been the attitude of the successive governments in following the "Directives" in formulating the policies of the respective governments, let us consider how the Directive Principles were engraved in the Constitution. In keeping Fundamental Rights and Directive Principles side by side, the intention of the Drafting Committee appears to be that both should be applied together and one must be complementary to the other. It also appears that the makers of the Constitution had an opinion that the Fundamental Rights have no meaning if the "Directive Principles" are not followed. Similarly the "Directive Principles" have no meaning if the Fundamental Rights are not sought to be implemented. One fuses with the other.

These Directive Principles are embedded in Articles 37 to 51 of the Constitution of India. It appears that the makers of the Constitution

have deliberately stated that these "Directives" are not enforceable by any Court in Article 37. Having declared as such, the Constitution further clarified that these directives are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws. Unfortunately, the governments are not applying these principles in making laws except in a very few cases. The governments are deliberately ignoring the fundamental nature of the 'directives'.

In interpreting Article 37 and speaking about the enforceability of the Directive Principles, as early as in 1967, the Supreme Court in the *I. C. Golaknath And Others v. State of Punjab* (1967) case said that the Constitutional philosophy of law is reflected in Parts III and IV of the Constitution. This view is again reflected in the *G.B. Pant University of Agriculture and Technology v. State of Uttar Pradesh and Others* (1970): "... socialistic concept of the society as laid down in Part III and IV of the Constitution ought to be implemented in the true spirit of the Constitution. Decisions are there of this Court galore wherein this Court on more occasions than one stated that democratic socialism aims to end poverty, ignorance, disease and inequality of opportunity." In relation to their enforceability, the Supreme Court in the *P. M. Ashwathanarayana Setty and Others v. State of Karnataka and Others* (1988) case, said that "... The Directive Principles of State Policy, though not strictly enforceable in courts of law, are yet fundamental in the governance in the country..."

It appears that the Supreme Court adopted a rather evasive path in interpreting the "Directive Principles". The Supreme Court on several occasions adopted a "hands off" attitude in this matter when it declared that it has no power to give directions for the enforcement of the Directive Principles of State Policy. Having accepted that they are fundamental for the governance of the country, apparently, there is no reason for the courts in not directing the government to evolve its policies in implementing the Directives. When they are considered to be fundamental for governance, the government must make laws only in the light of the Directives. No doubt that it is for the electorate to insist upon the governments to evolve plans and schemes for putting the Directives into action, and ultimately, it is the electorate to punish the political party in power for its failure to carry out the Directives, but still the courts can come to the rescue of citizens when policies directly in conflict with the Directives are implemented. While doing so, the Supreme Court is not formulating a new policy, or directing

the Executive to come up with a specific policy, it is only directing the Executive to formulate its policies in consonance with the Directives. The Supreme Court while making a law can read into the Directives and bring the substance and essence of the Directive Principles into a concrete form and shape. This view was adopted in the *U.P. State Electricity Board and Others v. Hari Shanker Jain and Others* (1978) case:

"...The injunction contained in the Directive Principles of State Policy in the Constitution of India means that while courts are not free to direct the making of legislation, courts are bound to evolve, affirm and adopt principles of interpretation which will further, and not hinder, the goals set out in the Directive Principles. This command of the constitution must be ever present in the minds of the Judges when interpreting statutes which concern directly or indirectly with matters set out in the Directive Principles..."

The Supreme Court adopted a pragmatic approach in the *Ashok Kumar Gupta , Vidya Sagar Gupta and Others v. State of U.P. and Others* (1997) case:

"...The Judges, therefore, should respond to the human situations to meet the felt necessities of the time and social needs; make meaningful the right to life and give effect to the Constitution and the will of the legislature. This Court as the vehicle of transforming the nation's life should respond to the nation's needs, interpret the law with pragmatism to further public welfare to make the constitutional animations a reality and interpret the Constitution broadly and liberally enabling the citizens to enjoy the rights... This Court, therefore, is not bound to accept an interpretation which retards the progress or impedes social integration; it adopts such interpretation which would bring about the ideals set down in the Preamble of the Constitution aided by Part III and Part IV – a truism meaningful and a living reality to all sections of the society as a whole by making available the rights to social justice and economic empowerment to the weaker sections, and by preventing injustice to them."

In the *Atam Prakash v. State of Haryana and Others* (1986) case, it stressed the need for a path to march towards a socialistic and democratic State. It held:

"...The implication of the introduction of the word 'Socialist' into the Preamble of the Constitution is clearly to set up a "vibrant, throbbing

socialist welfare society" in the place of a "feudal exploited society" ... we must strive to give such an interpretation as will promote the march and progress towards a Socialistic Democratic State."

Clarifying the position of Directive Principles, the Supreme Court clinched the issue thus in the *Minerva Mills Ltd. and Others v. Union Of India* (1980) case:

"... Merely because the Directive Principles are not enforceable in a court of law, it does not mean that ... they cannot create obligations or duties binding on the State. The crucial test which has to be applied is whether the Directive Principles impose any obligations or duties on the State; if they do, the State would be bound by a Constitutional mandate to carry out such obligations or duties, even though no corresponding right is created in any one which can be enforced in a court of law... the State is under a Constitutional obligation to carry out this mandate contained in Article 37..."

Like the six fundamental rights, guaranteed under Article 19, there are six Directives to be followed by the State under Article 38 of the Constitution. This is an important provision whereunder the State is mandated to establish a welfare state where social, economic and political justice is rendered in the national life. Article 39 is another important provision whereunder certain principles are handed out to the State to be used in the governance of the country. The sixth directive, relating to children, their health, conditions of freedom and dignity and protection against exploitation and moral and material abandonment was substituted by the Constitution (42nd Amendment) Act, 1976.

The other principles relate to adequate means of livelihood to be made available equally to men and women; ownership and control of the material resources of the community should be distributed as best to subserve the common good; concentration of wealth and means of production shall not be to the common detriment; equal pay for equal work forboth men and women; health and strength of workers, men and women to be taken care of, and the care of children of tender age, etc. Whereas Article 38 declares the social, economic and political philosophy of the State, which is in tune with the Aims and Objects of the Constitution, and which was further emphasized by the Chairman of the Drafting Committee, Article 39 details the plan and programme for establishing a welfare State through economic democracy.

The purpose of Articles 38 and 39 is to guide the governments in formulating the programme for establishing a Welfare State. Various legislations which were brought in the succeeding years like ceiling laws on agricultural holdings and urban land, estate abolition, land assignment, protection of civil rights, bonded labour, abolition of Jogini and Devadasi System, protection of women both inside and outside of their homes including their working place, abolition of contract labour, child abuse, employment guarantee, protection of the environment, protection of adivasis, laws relating to forests and forest produce, rural indebtedness and other such welfare measures. These laws were brought in only for building a welfare State through implementation of the Directive Principles. In the absence of such Directives, it may not be possible for the government to come out with such progressive measures. These legislations are brought keeping in mind not only the general good of the community but also the situation of the individual and the rights guaranteed to him.

It is not only the Constitution that has laid down certain guiding principles in the nature of directives which are essential and fundamental for the governance of the country, but the Supreme Court hasalso broadly approved the governmental actions which were brought about in tune with the directive principles. The Supreme Court did not completely shut its doors as far as the directive principles are concerned by holding that they are not enforceable in a court of law. There is a hesitation, yet again an affirmation, but it appears the Supreme Court could not so far evolve a happy blend of the Fundamental Rights and Directive Principles, in order to compel the government to establisha Welfare State, which ultimately is the main objective of the Constitution. The Courts should not provide an escape route for successive governments.

In spite of the assurance given by the Supreme Court regarding Articles 38 and 39 to the government, the successive governments, it appears, are sometimes charting a diametrically opposite course which is detrimental to the citizens and ultimately to the Nation. It is very sad that the people who took oath on the Constitution of India, when they occupy seats of power, eventually start working against the objectives of the very constitution. One such glaring subversive measure is the so called liberalization and privatization. Under the carpet of globalisation, the government is stampeding the several directives passed on to them by the Constitution of India.

For example, take the directive given under Article 38. The directive says that a social order for the promotion of Welfare of the people shall be secured by the State and the State shall strive to minimize the inequalities in income and to eliminate inequalities in status, facilities and opportunities. This directive is totally given a go by. The Welfare State is not established and there are no signs of it in the near future. Welfare State does not mean doling out certain benefits to the poor like selling rice and wheat at cheap rates. The inequalities between the poor and the rich are being widened on a very great scale. Only a chosen few are provided with opportunities and facilities. Those who are below the poverty line are increasing year by year. The poverty alleviation programme funded by the World Bank and such other international financing houses are not able to achieve their goal. If we consider the inequalities in income, the scenario is baffling. According to a study made by an Expert Committee, the percentage of people living below poverty line is more than 42 percent. This is ten percent more than what the earlier studies arrived at. Obviously, this would be much more, since it appears that the actual figures available on ground are different from the data furnished to the World Bank. The per capita expenditure by 41.8 percent of the rural population is about Rs. 447, whereas in urban areas, the percentage of people below the poverty line is 25.7 percent, as they spend Rs. 578.

In contrast, India stands at 6th rank for the most billionaires in the world. Four Indians were among the world's top ten richest in 2008, worth a combined $ 160 billion. In the year 1999-2000, according to one study, almost 77 percent of the rural population ate less than the international daily minimum of 2100 Kcal. The percentage for the year 2008-09 may not be different. Of the world's 146 million malnourished children, 57 million are Indian children and 47 percent of them are underweight. According to a report, 310 million is the number of people below poverty line. 455.8 million Indians live on less than $ 1.25 a day according to a World Bank report. 750 million people live on less than Rs. 20 a day. The India State Hunger Index says that "... India is home to the world's largest food insecure population with more than 200 million people who are hungry..." India scored 66th place in the 2008 Global Hunger list of 88 countries. In the U.N. Human Development Index India stands at number 132. 836 million people "get by" on Rs. 20 a day, whereas there are 53 dollar billionaires in India.

On the health side, the condition of rural India is very pathetic. There are no hospitals or dispensaries or health centres within reach of the poor. Even where there are any, there are no doctors or qualified persons to attend to the needy, no sufficient nurses or other staff. Even when the staff is available, there are no medicines. Once upon a time, in-patients were provided with food. That was dispensed with long ago. The minimum requirement of consumables like needles, syringes, cotton and bandage cloth is not available and the patients are asked to purchase them. The minimum equipment is not available in government hospitals in towns and even cities. Sanitary conditions in the hospitals are highly deplorable. Because of the pathetic and frightening conditions of the government hospitals because of lack of minimum requirements, private hospitals are on the increase. A culture of star-studded corporate hospitals is all-pervasive in the towns and cities. The cost of treatment is more frightening than disease and death. The budgetary allocation for health is being reduced from financial year to year. When the Constitution directs the Governments to ensure the provision of healthcare for citizens, particularly of children, women and old people, they are abdicating their responsibility without any remorse. Both the fields of education and health are highly neglected by the governments, paving way for the private sector to enter, occupy and loot the people. In this situation, rural India is the worst sufferer and the poor are left to their destinies in the true spirit of Indian tradition.

Another neglected field in India is supply of drinking water. Again rural India is the worst affected. According to a study of the World Health Organisation, "... 80 percent of diseases are caused because of lack of safe drinking water and sanitation. Five of the top ten diseases of children are also related to water and sanitation. The child death rate due to diarrhea is at 1000 per day..." Similarly, pre-natal deaths of children and the death rate at delivery time is the highest in India. According to one study, every fifth person in India is spending the night without a meal and every sixth person is searching for the next meal. There is no further necessity to describe the deplorable and pathetic conditions of rural India in relation to health and sanitation. It is also deplorable to note that the hunger situation in India is worse than the sub-Saharan situation. Even the health of Africa is improving. This is the situation of India, where it arrived at No. 132 out of 179 nations in the U.N. Human Development Index, after several decades of its Constitution.

When such is the situation of the poor in rural India, let us consider the economic standards of their representatives, the members of the 15th Lok Sabha, say, which is one of the important components of the Constitution. According to the affidavits filed by the elected candidates for the Lok Sabha, the total value of property of the 543 members put together is close to Rs. 28 billion. There are four members of Lok Sabha, who possess more than Rs.100 crores. There are 300 crorepatis. The average wealth of a Congress M.P. in the Lok Sabha is Rs. 6.86 crores and that of the B.J.P. is Rs. 3.06 crores. There are 47 crorepatis among 79 Ministers in the new Government. 64 Union Cabinet Ministers are worth about Rs. 5 billion. According to another study, the average worth of a member of Lok Sabha is Rs. 51 million, and the average worth of a Cabinet Minister is around Rs. 75 million. Of the 306 crorepatis in the new Lok Sabha, 141, almost half of them, belong to the Congress Party, which boasts it is the 'aam-aadmi' party, whereas across the country, 836 million people are unable to earn Rs. 20 a day. We can easily understand the situation when so many crorepatis are swarming the Lok Sabha and occupying the Ministerial *gaddis*, what would be the fate of the "Directive Principles" which are considered to be fundamental to the governance of the country. They conveniently forget that the Constitution mandates them to establish a Welfare State. They are, probably, happy to announce food subsidy, supply of rice or wheat at Rs. 2 or Rs. 3 per kilo, ration cards, old age pensions and the like. They are confident that this is the Welfare State which the Constitution mandates. Probably, they become aware of the Constitution only at the time of taking oath as either members of the Lok Sabha or Members of the Union Cabinet. They leave the Constitution to the Courts.

One of the sub-directives under Article 39 is regarding ownership and control of material resources and how they should be distributed to serve the common good. It appears that there is no attempt to follow this directive. The material resources are handed over to a few individuals in the name of industrial activity. Thousands and thousands of acres of cultivable lands are given to national and multinational companies for establishing units for manufacture of cars, fertilizers, pharmaceuticals and the like. Billions worth of valuable mines and minerals are similarly handed over to a handful of industrialists, who never contemplate on serving the common good. Not only valuable material available underneath the land, but unlimited and un-assessed wealth available under the sea is also given to another set of industrialists. In the name of 'Special Economic Zones', thousands of acres are handed over to

entrepreneurs, decapacitating the small and marginal farmers. Forests and forest produce are being allowed to be taken away by traders depriving thousands of tribals who live on the forest alone. Land, forests, mines, minerals, rivers, natural gas and the sea are made available to a very few limited wealthy scions who move always in the corridors of power, whether under the Congress Government or other anti-Congress governments. Now after completion of so many years of the Constitution, this handful of people have reached not only the top of the mountain of wealth but also arrived at the stage of dictating terms to the governments, both at the Centre and the States. These barons are in a position to make and unmake governments.

The other directives, such as right to work and education are also neglected. There are some attempts to put them into practice, but the outcome is not appreciable. The directive of right to work, after several years, was translated into a legislation, whereunder, the government is obligated to provide work for 100 days out of 365 days in a year. Even in this period of 100 days, minimum wages for the day are not guaranteed and given. The government boasts of the National Rural Employment Guarantee Act as its flagship. Without recognizing right to food, no purpose will be served by bringing about half-measures like the NREGA legislation. Equal pay for equal work for both men and women is still a distant cry.

The only commendable step the government has taken is translating the directive relating to education of children into a fundamental right under Article 21A by way of Constitution (86th Amendment) Act, 2002. The Supreme Court in the Mohini Jain case held that though right to education is not recognized as fundamental, it can be enforced under Article 19. In the same decision, it was held that the States' obligation to provide education is not absolute but relative. It was further held that once the State, by legislative or administrative action, provides facilities for education, its action must conform to the standard of equality and rationality underlying Article 14. But in the Unnikrishnan case, the right to only primary education is recognized as fundamental, and not education for a professional degree. In this decision, several other rights which were not enumerated as fundamental, are recognized as fundamental and made justiciable. This is an extension of the circumference of fundamental rights. Similarly right to healthy atmosphere, environment free from pollution is also recognized as fundamental, though the same is not included in Part III of the Constitution. In light of several directives issued by the Supreme Court, a separate legislation was also brought in

the matter of pollution control. This is a commendable march advanced by the Supreme Court. A safe approach is adopted by the Supreme Court as far as Legislative innovation is concerned in the *Delhi Cloth and General Mills Ltd. v. S. Paramjit Singh and Another* (1990) case, thus:

"... The legislature in its wisdom is presumed to understand and appreciate correctly the problems of the State and the needs of the people made manifest by experience. Absent blatant disregard of constitutional provisions, legislative innovation by social and economic experimentation must be permitted to continue without judicial interference."

The Supreme Court in this context of applying Directive Principles expressed a different approach in the *D. S. Nakara and Others v. Union of India* (1982) case thus:

"...Since the advent of the Constitution, the State action must be directed towards attaining the goals set out in Part IV of the Constitution... while interpreting or examining the Constitutional validity of legislative/ administrative action, the touchstone of Directive Principles of State Policy in the light of the Preamble will provide a reliable yardstick to hold one way or the other..."

Therefore, the interpretation must be in consonance with these principles and "... the constitutional goal of setting up a socialist State and the assurance in the Directive Principles of State Policy, especially the security in the old age, at least, to those who rendered useful service during their active years ..."

Likewise, the Supreme Court in the *Workmen of the Gujarat Electricity Board v. The Gujarat Electricity Board* (1968) case expressed its dismay over unfair labour practices and made certain recommendations. These recommendations and earlier directives regarding the contract labour system were ignored by the government, which in direct contravention, extended this unfair labour practice and introduced the same not only in its industrial establishments but also in its regular and permanent civil service. Now it has become a universal practice to appoint doctors, teachers, lecturers, engineers on contract basis. The nature of permanence of the service is slowly being destroyed. The governments are adopting the American way of "hire and fire". This not only creates insecurity but also leads to nepotism and favouritism.

The right to shelter is not yet recognized as fundamental. Unless the right to shelter and right to work are recognized as fundamental, there will be no meaning to right to life guaranteed under Article 21. The government is coming up with various schemes relating to providing houses to the poor but they are inadequate and inoperative .The poor are left at the mercy of the State for food and shelter. The need is now more for the right to shelter and work to be recognized as fundamental. The Supreme Court in the *Olga Tellis and Others v. Bombay Municipal Corporation and Others* (1985) case held:

"... The Principles contained in Articles 39 (a) and 41 must be regarded as equally fundamental in the understanding and interpretation of the meaning and content of fundamental rights. If there is an obligation upon the State to secure to the citizens an adequate means of livelihood and the right to work, it would be sheer pedantry to exclude the right to livelihood from the content of the right to life. The State may not, by affirmative action, be compellable to provide adequate means of livelihood or work to the citizens. But, any person, who is deprived of his right to livelihood except according to just and fair procedure established by law, can challenge the deprivation as offending the right to life conferred by Article 21..."

The Supreme Court has categorically explained the meaning of words "material resources" and "distributed" in the *State of Karnataka and Another v. Shri Ranganatha Reddy & Another* (1977) case thus:

"... material resources of the community in the context of reordering the national economy embraces all the national wealth, and not merely natural resources, all the private and public resources or meeting material needs, not merely public possessions. Everything of value and use in the material world is a material resource and the individual, being a member of the community, his resources are part of those of the community. To exclude ownership of private resources from the coils of Article 39(b) is to cipherise its very purpose of redistribution the socialist way. A directive to the State with a deliberate design to dismantle feudal and capitalist citadels of property must be interpreted in that spirit and hostility to such a purpose alone can be hospitable to the meaning which excludes private means of production ... consequentially, loyalty to the high purpose of the Constitution, namely, social and economic justice in the context of material want and utter inequalities on a massive scale, compels the courts to ascribe expansive meaning to the pregnant words

used with hopeful foresight, not to circumscribe their connotation into contradiction of the objectives inspiring the provision..."

The attempt of the government to sell majority of shares in HPCL and BPCL without amending or repealing the relevant Act was held to be unconstitutional in the *Centre For Public Interest Litigation v. Union of India and Another* (2003) case. In the case of mining leases, the Supreme Court in the *Victorian Granites (P) Ltd v. P. Rama Rao and Others* (1996) case held that "... Socio-economic justice is the arch of the Constitution. The public resources are distributed to achieve that objective since liberty and meaningful right of life are hedged with availability of opportunities and resources to augment economic empowerment." The words 'distribution' and 'concentration' were explained in the *State of Tamil Nadu v. L. Abu Kavur Bai and Oth*ers (1983) case: "...So construed, the word 'distribution' as used in Article 39(b) will include various facets, aspects, methods and terminology of a broad-based concept of distribution... By nationalizing the transport as also the units the vehicles would be able to go to the farthest corner of the State and penetrate as deep as possible and provide better and quicker and more efficacious facilities. This would undoubtedly be a distribution for the common good of the people and would be clearly covered by Clause (b) of Article 39... treating nationalisation of transport as a distributive process for the good of the community..."

In the matter of 'equal pay for equal work', the Supreme Court in the *Randhir Singh v. Union of India and Others* (1982) case held that "... 'Equal pay for equal work for both men and women' in Article 39(b) means equal pay for equal work for everyone and as between the sexes... the preamble to the Constitution declares the solemn resolution of the people of India to constitute India into a Sovereign Socialist Democratic Republic... the word 'Socialist' ... even if it does not mean 'to each according to his need' must at least mean 'equal pay for equal work'... Directive Principles ... have to be read into the fundamental rights as a matter of interpretation."

Legal aid to the poor is another concept developed by the Supreme Court taking inspiration from the Directive Principles. In the field of Maternity Benefits, the Supreme Court, in the *B. Shah v. Presiding Officer, Labour Court, Coimbatore and Others* (1977) case held:

"... In interpreting provisions of beneficial pieces of legislation like the one in hand which is intended to achieve the object of doing social justice to women workers employed in the plantations and which squarely fell within the purview of Article 42 of the Constitution, the beneficent rule of construction which would enable the women worker not only to subject but also to make up her dissipated energy, nurse her child, preserve her efficiency as a worker and maintain the level of her previous efficiency and output, has to be adopted by the Court..."

During this long period of operation of the Constitution, the Supreme Court is trying to fuse the Directive Principles into Fundamental Rights and vice versa on the theoretical plane but when faced with the question of giving effective direction in implementing a directive, the court has been a little reluctant, withdrawing from the scene stating that the Directive Principles are not justiciable. But a trend is evolving to transfer Directive Principles into Fundamental Rights without considering and interpreting the Directive Principles in isolation. The Executive is escaping from following the Directives in the confidence that they may not be hauled up in the Court for their lapses. The march towards establishing a Welfare State, by utilizing the mechanism of the Directive Principles, is very tardy.

Centre and State Relations

The relations – both executive and legislative, but largely executive, between the Centre and the States have evoked much discussion, controversy, conflict and confrontation. At one point of time, there was an allegation levelled against the Centre that the States are being reduced to municipalities. Since India adopted a Parliamentary system of democracy, there arises a necessity of political parties trying to come to the Centre stage. It is now almost a party democracy. In such circumstances, the political party which is in power at the Centre, tries to overrun or dominate the States, where a different party is in power. There is another instance, where the same political party is ruling both at the Centre and one or more States, then a situation arises wherein the leadership in the States is slowly made subservient to the leadership at the Centre. The State leadership is guided by the Centre. If the State leadership is a little weak, it has to invariably look to the Central leadership for necessary guidance at each step. There are instances where the Central leadership nominates the leader for the State and gets him or her elected by the legislature party concerned. There are yet other instances, wherein if the leader in a particular State tries to assert and evolve as an independent force, then such a leader is immediately replaced. There are instances where a nauseating loyalty to the leader at the Centre is exhibited. This is not good for democracy. Loyalty is necessary, but it should be to the party, to the ideology, to the programme, but not to a single individual, however powerful he or she may be. It breeds a tendency of dictatorship, which is, at any time detrimental and destructive to democracy. Leadership is always evolved by involvement in the programme of the party for the benefit of the people and by cultivating democratic principles, and not by obdurate obedience. From the beginning, the Indian National Congress Party developed this type of practice and the Central leadership did not allow any State leader to grow. The Bharatiya Janata Party, which was criticizing the Congress Party for such undemocratic practices, started doing the same when it came to power in Centre and in one or two States. In the case of Bharatiya Janata Party, the situation is much worse in the

sense that the Central leadership itself is manufactured and controlled by the Rashtriya Swayamsevak Sangh (RSS). The political culture which was developed at the time of the beginning of the Constitution is being followed almost completely by the parties or persons who came to power, subsequently.

What the Constitution says

In Part XI, the Constitution has clearly demarcated powers—both legislative and executive—to be exercised by the Union and the States. The list of subjects which are earmarked for the Union and the States are also given in the Seventh Schedule of the Constitution. The Constitution has not given any scope for encroachment of powers by any State. But the Union is given power to legislate on a subject which is exclusively reserved for the State but with the consent of the State. Some subjects are allocated to the concurrent list, which means, on those subjects, both the Centre and the State can legislate. In such circumstances, if there is any conflict between the two legislations, what is to be done is also dealt with by the Constitution. There is no ambiguity in these matters. The Constitution is also not silent on any aspect to be tackled later on by the respective governments by making use of established norms or conventions. Making use of the administrative experience under the British India Act, 1935, the Drafting Committee came up with a well designed exercise of powers both by the Centre and the States under the Constitution of India. Under Article 246 of the Constitution, three lists are prepared enlisting the different subjects. List I is called the 'Union List'. The Parliament is alone competent to legislate on the matters enlisted. List II, which is called the 'State List', whereunder power is given to the States to legislate. List III which is called the 'Concurrent list' where the Parliament as well as States can exercise power to legislate. Under this scheme, there is no opportunity for anyone to transgress the limits. The Centre can also direct a State to make laws on the subjects listed in List II in the interest of the Nation. In spite of such a well defined scheme, several skirmishes have occurred between the Centre and the States.

Against this background, let us examine, what is the nature and character of the State, whether it is unitary or federal? Article 1 of the Constitution described the country as a Union of States. The territory of India comprises the territories of the States. When it is called a Union, it means a collection of different States. The different States form a

Union. Prior to the advent of the Constitution and independence, there were different States, otherwise called provinces, under British Rule. All these units were merged, unified, amalgamated or annexed and ultimately formed into a Union. Some of the provinces were voluntarily merged into the British ruled areas, while Hyderabad was annexed by the Government of India in military operations against the wish of its ruler and the province of Jammu and Kashmir was merged by the ruler with the British India. Every area had a system of government prior to the formation of the Union. Therefore, we find differences in the texture of the governance, apart from the language and cultural differences. All these different areas have to be evolved into a nation, not into just a single geographical Union. Union is a political formation, whereas nation is an emotional evolution.

Though the Constitution envisaged two different political outfits, one as Union and the other as States, the thrust is towards evolution as a Union. Though a Federal character is shown in the Constitution, the drive is towards a Union. Answering after the great debate in the Constituent Assembly, Dr. Ambedkar explained the relations between the Centre and the States thus:

"...The basic principle of Federalism is that the Legislative and Executive authority is partitioned between the Centre and the States, not by any law to be made by the Centre, but by the Constitution itself. This is what the Constitution does. The States under our Constitution are in no way dependent upon the Centre for their legislative or executive authority. The Centre and the States are co-equal in this matter. It is difficult to see how such a Constitution can be called centralism. It may be that the Constitution assigns to the Centre too large a field for the operation of its legislative and executive authority than is to be found in any other federal Constitution... The chief mark of federalism as I said lies in the partition of the legislative and executive authority between the Centre and the Units by the Constitution. This is the principle embedded in our Constitution... The second charge is that the Centre has been given the power to override the State" (CAD 1949-11-25, 11.165.314–11.165.317).

Detailing under what circumstances such powers are given to the Centre, Dr. Ambedkar further clarified that "... these overriding powers do not form the normal feature of the Constitution. Their use and operation are expressly confined to emergencies only ... There can be no doubt

that in the opinion of the vast majority of the people, the residual loyalty of the citizen in an emergency must be to the Centre and not to the Constituent States. For it is only the Centre which can work for a common end and for the general interest of the country as a whole."

As far as the legislative functioning is concerned, the Constitution has made watertight compartments and taken all precautions to avoid any transgressions. Since the Parliament and the State Legislature are given powers to legislate on matters enumerated in the lists, there may arise a situation where both legislate on a matter enumerated in the concurrent list. In such case, the Constitution in Article 254, has made a provision relating to a situation of inconsistency between laws made by Parliament and Laws made by the Legislature of the State. According to the said Article, the law made by the Parliament, whether passed before or after the law made by the Legislature of the State, as the case may be, the existing law shall prevail and the law made by the Legislature of the State shall, to the extent of repugnancy, be void. In the matters listed in the concurrent list, the Parliament can make a legislation in spite of an existing legislation made by the Legislature of the State and in such cases, the courts play a role to give a harmonious construction to both legislations and hold them together, except only in cases of repugnancy. There is not much conflict in these matters between Centre and the States, and the Supreme Court has commendably played its role of umpire in this regard.

As far as executive powers of the Centre and the States are concerned, we find more friction, and in certain situations, a direct clash. There are a sufficient number of instances where the Centre started acting against the wishes and consent of the States and sometimes against their opposition even. In such circumstances, the institution of Governor was misused by the Centre for its political ends. Such were the instances, which prompted the political analysts to call the Governor an agent of the Centre.

President and the Governor

The executive function of the Centre is expressed through the President and that of the State through the Governor and the Governor is appointed by the President. Answering a criticism that the Centre was made a stronger unit, Dr. Ambedkar explained (CAD 1948-11-04, 7.48.199):

"... Under the Draft Constitution the President occupies the same position as the King under the English Constitution. He is the head of the State but not of the Executive. He represents the Nation but does not rule the Nation. He is the symbol of the Nation... The President of the Indian Union will be generally bound by the advice of his Ministers. He can do nothing contrary to their advice nor can he do anything without their advice. The President of the United States can dismiss any Secretary at any time. The President of the Indian Union has no power to do so, so long as his Ministers command a majority in Parliament."

Regarding the position of the Governor, Dr. Ambedkar explained that "..the position of the Governor is exactly the same as the position of the President...." (CAD 1948-12-30, 7.76.190).

When the institution of the President was given an exalted position in the Constitution, there were complaints that the said institution was misused by the governments on several occasions for their political ends, invoking emergency powers. There was an unsavoury comment that the President is only a rubber stamp. In fact, Sri K.R. Narayanan, said in many clear words, that there were such criticisms, that the post of President was in fact reduced to that level, but, he said in more assertive words that the President, in fact, under the Constitution was endowed with several powers, and he can wield much power under the Constitution. The clashes that occurred between the Centre and the States also exposed the incumbent to the inherent weaknesses of the institution of the President, and the political mechanisms of the party in power at the Centre.

One such major clash occurred in the State of Kerala, when the Communist Party of India, was democratically elected to power in the general elections held in the State and formed the government. The reforms that were undertaken by the State Government, though socialist in nature, and in accordance with the relevant provisions of the Constitution, were not palatable to the Indian National Congress Party which was in power in the Centre, and it manipulated the situation and saw to it that the State Government was dismissed by using the office of the President. Similar abuse of power took place in some other States too. Another major controversy which shook the Nation was the imposition of Emergency in the country. Both the Central Government and the institution of the President came under bitter criticism and heavy attack throughout the country for that most undemocratic and

dictatorial measure. The Supreme Court of India lent its supportive arm to the Central Government by upholding the emergency power and endorsing the power to suspend the fundamental rights of the citizens guaranteed under the Constitution during the period of emergency, in the most infamous *Additional District Magistrate, Jabalpur v. S. S. Shukla* (1976) case. Another major clash was when five State governments, which were being ruled by the Bharatiya Janata Party, were dismissed and the same was endorsed by the Supreme Court, in *S. R. Bommai v. Union of India* (1994) Case. These acts of the Central Government, which were termed as Constitutional excesses, were undertaken by using the emergency power under Article 356 of the Constitution. The Central Government can invoke the power under Article 356 to suit its political necessities, and in those circumstances the institution of President has come under much criticism. Dr. Rajendra Prasad, the first President of India and Sri K.R. Narayanan, another President stood out as the most illustrious Presidents who went against the dictates of the most formidable Prime Ministers of the time, Jawaharlal Nehru, and another not so powerful A. B. Vajpayee, respectively.

Article 356 of the Constitution is a point of conflict between the Centre and the State. Under this Article, the President can issue a proclamation, assuming all powers of the State government including its legislative power and run the government. During the period of proclamation, till it is revoked, the State Legislature is either dissolved or suspended or kept in suspended animation. This particular provision was necessitated because the founding fathers of the Constitution felt the need to have such provision in the Constitution, to have some machinery to avert the breakdown of the Constitution. Explaining the situation where the President is necessitated to intervene in case of failure of the Constitution, Dr. Ambedkar said:

"... I think it is agreed that our Constitution, notwithstanding the many provisions, which are contained in it whereby the Centre has been given powers to override the provinces, nonetheless in a Federal Constitution and when we say that the Constitution is a Federal Constitution it means that the provinces are as sovereign in their field which is left to them by the Constitution as the Centre is in the field which is assigned to it.... If the Centre is to interfere in the administration of provincial affairs, as we propose to authorize the Centre... it must be by and under some obligation which the Constitution imposes upon the Centre. The invasion must not be an invasion which is wanton, arbitrary and unauthorized

by law... We must also give liberty to the President to act even when there is no report by the Governor and the President has got certain facts within his knowledge on which he thinks he ought to act in the fulfillment of his duty..." (CAD 1949-08-03, 9.110.31).

Regarding the apprehensions about the probable abuse of this provision, Dr. Ambedkar explained:

"...I may say that I do not altogether deny that there is a possibility of these articles being abused or employed for political purposes. But that objection applies to every part of the Constitution which gives power to the Centre to override the provinces... The proper thing we ought to expect is that such articles will never be called into operation and that they would remain a dead letter. If at all they are brought into operation, I hope the President, who is endowed with these powers, will take proper precautions before actually suspending the administration of the provinces..." (CAD 1949-08-04, 9.111.49).

Though Dr. Ambedkar gave assurance in the Constituent Assembly that these drastic measures would never be called into operation and that they would remain a dead letter, this provision was pressed into service about 115 times until 2016. The earliest occasion was in Punjab in 1951. According to Granville Austin (2003), who had termed the Indian Constitution as the 'Cornerstone of a Nation' earlier, commented again after fifty years of the Constitution that "... Over the years, President's Rule became extremely controversial because it was thought often used to serve Central government convenience or political party interests, not to protect Constitutional governance and sound administration. Deplored as coercion, the device came to erode the sense of unity rather than confirming it. The Central Government imposed President's Rule nine times from 1950 through 1965 and two instances – Punjab in 1951 and Kerala in 1959 – became symbols of its questionable use..." (p. 157).

It is very illuminating to note how the powers under Article 356 were abused by the Central Government and how democratic and constitutional principles were subverted. Granville Austin (2003), in his book, graphically describes how these political manipulations took place in the high seats of power both of government and party:

"... In a Congress government itself, a Chief Minister was not given the liberty to form his cabinet with persons of his choice. When he refused

to toe the line of Central Parliamentary Board of the Congress Party, he was asked to resign, and four days later, a report from the Governor was obtained and the President's Rule was imposed. According to the Centre, quoting from authentic records and papers, President Rajendra Prasad was very reluctant to sign on the proclamation. It was reported that he was very unhappy and disliked to suspend a normal functioning State Government. His unhappiness and reluctance was reflected in the exchange of letters between the President and the Prime Minister. Ultimately, the President was compelled to issue the proclamation, in order to satisfy the Constitutional ritual..."

Kerala was yet another classic example where the said provision was blatantly abused by the Congress Government and the Party to dismiss the Communist Government in the State which was democratically elected to power by the people. As a matter of fact, it was a great historical event which exhibited to the world that the Communist Party could also be voted to power in a State, by the people. It is also a grave lesson that a non-communist party in power at the Centre will not tolerate a Communist government in a State, even if it is democratically elected and has legitimately assumed power.

In the 1957 General Elections, the Communist Party of India won the elections in Kerala and formed government with the support of independents. The communist government initiated two legislations which were revolutionary in character; one relating to education, the other, to land reforms. When the legislations were routed through for the assent of the President as required under the Constitution, the Congress Party, headed by Smt. Indira Gandhi, the daughter of Jawaharlal Nehru, the Prime Minister of India, engineered trouble in the State and encouraged mass agitation against the legislations. The situation was brought to the stage of a breakdown of the Constitution. A report was obtained from the willing Governor to the effect that the law and order situation in the State is such that a constitutionally elected Government cannot function. Based on such a report, President's Rule was imposed. The then Congress President insisted that the Communist Government, at any cost, be dismissed. Everything was tailored to achieve that purpose. The President was also made to sign the proclamation.

Several such misuses and abuses of power under Article 356 of the constitution happened at the instance of the Central Government. When a political situation emerged in different States wherein political

parties or combinations of political parties which did not belong to Congress Party could form governments, such governments were toppled either by engineering defection in the ruling combination or by creating violence and invoking Article 356 of the Constitution to dismiss the Government. There was hardly a State, where President's Rule was not imposed. Almost every State fell prey to the abuse. Wholesale misuse of the said power was evident when four governments were dismissed in the aftermath the demolition of Babri Masjid in Uttar Pradesh. All the Governments which were unceremoniously dismissed belonged to Non-Congress parties. The matters were carried to the Supreme Court and the Court in the *S. R. Bommai v. Union of India* (1994) case affirmed the secular character of the State and held that every action of the State must be in consonance with the secular character.

In the State of Karnataka, the Janata Dal formed government in 1985. Because of defections, the government was dismissed by Presidential proclamation. In the general elections held in 1990, the Bharatiya Janata Party formed governments in Uttar Pradesh, Madhya Pradesh, Rajasthan and Himachal Pradesh. The major plank of Bharatiya Janata Party was to build a temple for Rama, at the site of Babri Masjid. There was an organized attack on the Masjid to destroy it and construct a temple by taking thousands of *Karsevaks* (volunteers) to Ayodhya, where the Masjid was in existence. The Masjid was demolished on 6th December, 1992. The State Government in Uttar Pradesh took the exclusive role of destruction of the Masjid, with the full support of Bharatiya Janata Party, and the Central Government which was headed by the Congress Party played a passive role and refused to act at the crucial hour of the attack and helped the Karsevaks, in a way, in demolishing the masjid without any obstruction or intervention. Thereafter, the President, by a proclamation under Article 356, dismissed the Legislative Assemblies of the four States. The Government of Uttar Pradesh was dismissed on December 6th 1992 itself. Apart from laying down constitutional parameters for imposing President's Rule and indicating under what circumstances such proclamation can be made and what factors and materials are to be considered and how to arrive at a satisfactory conclusion by the President for issuing such proclamation, the Supreme Court in the Bommai Case, indicated the limitations to the political executive for guiding the President in issuing such a proclamation. The elaborate judgment considered by 9 Judges, dealing with the emergency power under the Constitution, may become, for any future Executive, a guideline

in invoking the extraordinary power which affects the essential federal character of the State. An illustrative passage reads thus:

"... The power conferred by Article 356 is a conditioned power, it is not an absolute power to be exercised in the discretion of the President... the power conferred by Article 356(1) upon the President is of an exceptional character designed to ensure that the government of the States is carried on in accordance with the Constitution... any misuse or abuse of this Constitutional power is bound to play havoc with our constitutional system. In a sense, it is not really a power but an obligation cast upon the President in the interest of preservation of constitutional government in the States. It is not a power conceived to preserve or promote the interests of the political party in power at the Centre for the time being nor it is supposed to be a weapon with which to strike your political opponent. The very enormity of this power – undoing the will of the people of a State by dismissing the duly constituted government and dissolving the duly elected Legislative Assembly – must itself act as a warning against its frequent use or misuse, as the case may be. Every misuse of this power has its consequences which may not be evident immediately but surface in a vicious form a few years later... Wisdom lies in moderation and not in excess" (*S. R. Bommai v. Union of India,* 1994).

In spite of this caution, the Central Government again resorted to abuse the provisions and dissolved the Legislative Assembly in Bihar. There were other instances of such a nature, but this incident is more illuminating. The Supreme Court took notice of everything in the*Rameshwar Prasad and Others v. Union of India and Another* (2006) case, detailed the facts, and held:

"... The report of the Governor was received by Union of India on 22nd May, 2005 and on the same day, the Union cabinet met at about 11.00 P.M. and decided to accept the report of the Governor and sent the fax message to the President of India, who had already left for Moscow, recommending the dissolution of the Legislative Assembly of Bihar. This message was received by the President of India at his Camp office in Moscow at 0152 hrs (IST). President of India accorded his approval and sent the same through the fax message which was received at 0350 hrs. (IST) on 23rd May, 2005. After due process the notification was issued formally at 1430 hrs. (IST) on 23rd May, 2005 dissolving the Bihar Assembly... In the present case, there is nothing on record except

the reports of the Governor. In the absence of the relevant material much less due verification, the report of the Governor has to be treated as the personal *ipse dixit* of the Governor. In the present case, like in Bommai case, there is no material whatsoever except the *ipse dixit* of the Governor. The drastic and extreme action under Article 356 cannot be justified on mere *ipse dixit*, suspicion, whims and fancies of the Governor.

... This Court cannot remain a silent spectator watching the subversion of the Constitution. It is to be remembered that this Court is the sentinel on the *qui vive*. In the facts and circumstances of this case, the Governor may be the main player, but the Council of Ministers should have verified the facts stated in the report of the Governor before hurriedly accepting it as a gospel truth as to what the Governor stated. Clearly the Governor has misled the Union Council of Ministers to the President leading to the issue of the impugned Proclamation... In the present case, ... the action of the Governor was a mere pretence, the real object being to keep away a political party from staking a claim to form the Government."

The whole drama was enacted in order only to deprive the Janata Dal (U) of the opportunity to form a government.

In an authoritative pronouncement in the *Shamsher Singh and Another v. State of Punjab* (1974) case, the Supreme Court held:

".. In making a report under Article 356, the Governor will be justified in exercising his discretion even against the aid and advice of his Council of Ministers. The reason is that the failure of the Constitutional machinery may be because of the conduct of the Council of Ministers. This discretionary power is given to the Governor to enable him to report to the President, who, however, must act on the advice of his Council of Ministers in all matters... The Constitution does not aim at providing a parallel administration within the State by allowing the Governor to go against the advice of the Council of Ministers... These discretionary powers exist only where expressly spelt out and even these are not left to the sweet will of the Governor but are remote-controlled by the Union Ministry which is answerable to Parliament, for those actions... In all his constitutional 'functions', it is the Ministers who act; only in the narrow area specifically marked out for discretionary exercise by the Constitution, he is untrammeled by the State Ministers' acts and advice..." Again the authoritative pronouncement from the

Supreme Court came in the Bommai Case: "...the conclusion is that the validity of the proclamation issued by the President under Article 356(1) is judicially reviewable to the extent of examining whether it was issued on the basis of any material at all or whether the material was relevant or whether the proclamation was issued in the *mala fide* exercise of the power..."

Thus it is seen that the Constitution has given power to the Governor to recommend to the President the dissolution of the Legislative Assembly, when in his opinion, there is a failure of the Constitutional machinery. He must send a report to the President to take action in accordance with the constitution. The President, again shall act on the advice of his Council of Ministers i.e. the Union Cabinet. It appears that the whole operation is conducted in a circuitous way. There are a number of incidents where the governments in States were dismissed, only because they were being headed by parties that were in opposition to the ruling party in the Centre. The very fact that Article 356 was pressed into service more than 100 times reveals the extent to which it was misused. Imposition of President's Rule when the government has collapsed on its own by losing majority in the Legislative Assembly until an alternative arrangement is made is one thing, but the government in the Centre engineering a coup to create a situation in the State that the government is unable to run the State in accordance with the provisions of the Constitution and dismissing it is another thing. There were instances where a split was encouraged by the Union Government in the legislature party to bring down a government. There were also instances where the Governor was directed to manufacture reports, stating that there is a failure of constitutional mechanism in the State and inviting invocation of Presidential Rule. Armed with such reports, the Union Government recommends to the President to invoke Article 356. Incidents of abuse and misuse of Article 356 maybe on the increase in the coming years, since the political situation is so changing that no single party will be in a position to form government on its own and multiparty Governments may be increasing. In such a situation, if the Centre wants to change the combination of the ruling group and replace it with another coalition, there is a likelihood of the Centre making use of Article 356, and pressing it into service, and obtaining a report from the Governor to suit its purposes. This may, ultimately, lead to a threat to democracy and federalism. The party in the Centre might expect that ultimately the regional parties will be rejected by the people in disgust, and the national parties may be preferred. But

there are no such symptoms appearing, because regional aspirations are growing more and more and the spirit of nationhood is not blossoming. National feeling does not mean that the different aspirations of the State are to be killed. The spirit of a nation is a fraternal feeling nurtured by sharing of the social and economicfruits equally by people, whereas the federal structure is to be developed by the political mechanism. The role of different castes controlling the political affairs of the States and the Centre is also responsible for the tensions in the relations between the Centre and States. The desire to control the natural resources in the States also contributes to the said tensions. The role of capital and the interference of moneybags are also threatening the existence of the State governments and they are in a position to exert influence on the Centre to act upon and replace the governments in the States to accommodate their interests. The moneybags are in a position to get their men elected and dictate terms to the Centre. This is the latest trend we observe.

In such circumstances, not only sane thinking, by both the President and the Governors, but also ensuring the functioning of the Constitution remains true to its spirit, is much needed. The provisions of the Constitution and the parameters fixed by the Supreme Court in the matter of invoking Article 356 will be more helpful in keeping the political players in check. It is a sad comment that the assurance given to Constituent Assembly that the provisions of Article 356 will not be pressed into service but will be kept in cold storage has been belied. It appears that the parties in power at the Centre are subverting the Constitution for their parochial and partisan ends.

The Judiciary

The scheme of the constitution is mainly divided into two: The Union and the States. Each part is endowed with a Legislature. Similarly the Judiciary is also specified in two parts: the Union Judiciary and the High Courts in the States. Since the Supreme Court of India is considered as the custodian, interpreter, arbiter and sentinel on the *qui vive*, it will suffice if the Constitution and functioning of the Supreme Court is studied for the purpose of the book. Chapter IV of the Constitution deals with Higher Judiciary. Article 124 deals with Establishment and Constitution of the Supreme Court. According to Article 124, there shall be a Supreme Court of India consisting of a Chief Justice of India and not more than seven other Judges. By the Supreme Court (Number of Judges) Amendment Act, 1986, the number of other Judges has been increased to twenty five. Later, it has been further increased to 30. The Judges are appointed by the President in the manner prescribed under the Constitution in Chapter IV. Other Articles relate to the functioning of the Court and its jurisdiction in the matters. Before we consider the functioning of the Supreme Court, it is appropriate and instructive to consider how the Founding Fathers of the Constitution viewed it, and what they aimed at. The Constituent Assembly unanimously felt that the judiciary must be both independent of the executive and be competent in itself. Answering how these two objects could be secured, Dr. Ambedkar said:

"...There are two different ways in this matter is governed in other countries. In Great Britain the appointments are made by the Crown, without any kind of limitation whatsoever, which means by the executive of the day. There is the opposite system in the United States where, for instance, offices of the Supreme Court as well as other offices of the State shall be made only with the concurrence of the Senate in the United States.... The draft Article, therefore, steers a middle course. It does not make the President the supreme and the absolute authority in the matter of making appointments. It does not also import the influence of the Legislature. The provision in the Article is that there

should be consultation of persons who are ex hypothesi, well qualified to give proper advice in the matters of this sort, and my judgment is that this sort of provision may be regarded as sufficient for the moment.

With regard to the question of the concurrence of the Chief Justice, it seems to me that those who advocate that proposition seem to rely implicitly both on the impartiality of the Chief Justice and the soundness of his judgment. I personally feel, no doubt that the Chief Justice is a very eminent person. But after all, the Chief Justice is a man with all the failings, all the sentiments and all the prejudices which we as common people have; and I think, to allow the Chief Justice practically a veto upon the appointment of Judges is really to transfer the authority to the Chief Justice which we are not prepared to vest in President or the Government of the day. I, therefore, think that that is also a dangerous proposition." (CAD 1949-05-24, 8.90.157, 8.90.158).

Two aspects, in the matter of appointment and other related matters of the Supreme Court Judges, have raised much controversy: one relating to their appointment, and the second relating to their removal. Under Article 124, the authority to appoint the Judges of the Supreme Court is vested with the President. The President, again, under the scheme of the Constitution, will be guided by the Cabinet. Virtually, it can be said that the Prime Minister and the Members of the Cabinet, have the power to appoint Judges, no doubt in accordance with the procedure laid out under the said Article. Similarly the Judges of the High Court will also be appointed by the President, under Article 217, after consultation with the Chief Justice of India, the Governor of the State and, in the case of Judges other than the Chief Justice, the Chief Justice of the High Court concerned will also be consulted. As per the scheme, the appointment of Judges including the Chief Justice of the Supreme Court as well as the High Courts is vested with the Executive. The courts have no role except to be consulted. The practice was that the appointments would be made by the Executive, more particularly, the head of the State. The appointments, no doubt, were made of competent and well qualified persons but they were mostly tempered by a political tinge. The highest court in India, which was made in accordance with the Government of India Act, 1935, was continued under the new constitution of India. It is widely held that those who have connections with the power centre, both at the Centre and the States, alone could get the opportunity of getting appointed as Judges in the higher judiciary.

The Supreme Court, slowly and deliberately usurped this power of appointing Judges, by rendering judgments in this regard. The first Judgment is that of the S.P. Gupta case. The second case is the *Supreme Court Advocates-on-Record Association and Another v. Union of India* (1993) Case. The first is of 7 Judges and the second is of 9 Judges. There is yet another judgment of the Supreme Court in this regard, the special reference No.1 of 1998, which is also of 9 Judges. The first case was filed in the form of a PIL, referred by a practicing advocate of the Supreme Court, and the second by the Advocates-on-Record in the Supreme Court. Advocates may have an interest in the matter of appointment of Judges, but that itself may not be a proper course for them to file a case in the Supreme Court and the Supreme Court to assume jurisdiction and wrest power of appointment of Judges from the Executive in direct conflict with the provisions of the Constitution. These judgments are known as the First Judges Case and Second Judges Case. The third case is almost confirming the Second Judges case but making a dent in the aspect of 'primacy' of the Chief Justice in the matter of appointment of Judges. After the Second Judges case, there was widespread criticism that the Supreme Court had re-written the Constitution as far as appointment of Judges was concerned.

From the beginning, the Supreme Court is of the firm view that "... the primary function of the Judiciary is to interpret the law." It may lay down principles, guidelines and exhibit creativity in the field left open and unoccupied by legislation. Courts can declare the law, they can interpret the law, they can remove obvious lacunae and fill the gaps, but they cannot encroach into the field of legislation properly meant for the legislature, as affirmed in the *P. Ramachandra Rao v. State of Karnataka* (2002) case. It was earlier, confirmed by the Supreme Court in the *A. K. Gopalan v. The State of Madras* (1950) case that "...But outside the limitations imposed on the legislative powers, our Parliament and the State Legislatures are supreme in their respective legislative field and the court has no authority to question the wisdom or policy of the law duly made by the appropriate legislature".

In light of these affirmations, the Supreme Court in the two cases discussed below deviated from the well laid path and appropriated powers unto itself.

The Two Cases:

In the First Judges case or *S. P. Gupta v. Union of India and Others* (1981) the decision was arrived at after a great discussion thus:

"... The Central Government must consult at least one Judge out of the Judges of the Supreme Court and of the High Courts before exercising the power of appointment conferred by clause (2) of Article 124... But it seems that this requirement is not complied with in making appointments ... the Chief Justice of India alone is consulted in the matter of appointment of a Supreme Court Judge ... This is, to our mind, not a very satisfactory mode of appointment because wisdom and experience demand that no power should be vested in a single individual however high and great he may be and however honest and well-meaning... There must be checks and controls in the exercise of every power, particularly when it is a power to make important and crucial appointments and it must be exercisable by plurality of hands rather than be vested in a single individual... We would rather suggest that there must be a collegium to make recommendation to the President in regard to appointment of a Supreme Court or High Court Judge."

In the Second Judges case or *Supreme Court Advocates-on-Record Association and Another v. Union of India* (1993), S.P. Gupta (1981) decision was reversed and it was held that primacy in the matter of appointment of Judges to the superior courts is vested with the Judiciary. Therefore, the role has been moved from the hands of the Executive to the Judiciary. It is further held that "... The Chief Justice of India shall be appointed on the basis of "selection by merit" and "seniority alone" rule shall not be applicable." Thus, the Supreme Court has decided by itself, how the Chief Justice of Supreme Court is to be appointed. The Judges made the rule for themselves. Regarding the appointment of a Judge of a High Court, a provision for consultation with the Chief Justice of the High Court concerned was introduced "... because of the realisation that the Chief Justice is best equipped to know and assess the worth of the candidate, and his suitability for appointment as a superior judge; and it was also necessary to eliminate political influence even at the stage of the initial appointment of a judge, since the provisions for securing his independence after appointment were alone not sufficient for an independent judiciary."

What is meant by the primacy of the opinion of the Chief Justice of India in this context is, in effect, primacy of the opinion of the Chief Justice of India formed collectively, that is to say, after taking into account the views of his senior colleagues who are required to be consulted by him for the formation of his opinion. In this judgment, the majority view in the S.P. Gupta case, giving primacy to the Central Government in the matter of appointment of Judges to the superior courts was held to be not a good law. Now the process of appointment of Judges to superior courts is laid down thus:

"...The process of appointment under Article 217(1) is to begin with the recommendation of the Chief Justice of the High Court. He must ascertain the views of the two senior most Judges of the High Court and incorporate the same in his recommendation. The Chief Justice of India while examining the recommendation must take into account the views of two senior most Judges of the Supreme Court and also the opinion of the Senior Judge conversant with the affairs of the High Court concerned. The opinion of the Chief Justice of India forwarded in the manner indicated above, shall be primal. No appointment can be made by the President under Articles 124(2) and 217(1) of the Constitution unless it is in conformity with the opinion of the Chief Justice of India."

This process is further commented upon with the following:

"...the link between consultation, the advice given as a result thereof and the ultimate appointment of the person about whom there is consultation, is inextricable making the entire process of appointment of Judges under the Constitution as an integrated one. The necessary consequence is that the Executive is not free to make an appointment which has not been recommended by the Judiciary... The requirement of prior consultation with the superior judiciary is a logical consequence of having an independent judiciary as a basic feature of the Constitution. If the executive is left to ignore the advice tendered by the Chief Justice of India, in the process of consultation, the very purpose and object of providing consultation with the judiciary is defeated. We have, therefore, no doubt in our mind that the Executive is bound by the advice/recommendation of the Chief Justice of India in the process of consultation under Articles 124(2) and 217(1) of the Constitution... This process of consultation shall also be followed while transferring any Judge/Chief Justice from one State to another."

This is how the Supreme Court changed the law relating to the appointment of the Judges of the superior courts. They made the change in such a way that the recommendation of the Chief Justice of India is to be accepted compulsorily. The President cannot make an appointment of a particular person against the recommendation of the Chief Justice of India. This is not the original intention of the Constitution. The Constitution only says that the Chief Justice of India is to be consulted. Now the consultation is read as concurrence. A totally new connotation is given to the word consultation. In addition to this, the initiative and the final say is also not left with the Chief Justice of India alone. It was to be made by the Chief Justice along with a collegium of senior most Judges of the Court. In the beginning, the collegium was restricted to two, but by Presidential Reference, the Supreme Court enlarged it to four. In the case of appointments relating to any High Court, the collegium is restricted to only three. The Judges of the Supreme Court were not prepared to leave the arena of appointment of Judge of the superior Courts to the Chief Justice alone. They wanted to share the power with the Chief Justice. The number of Judges intended to share the opinion with the Chief Justice was thus extended to four and the recommendation of the Chief Justice of India was also made compulsory, and there cannot be an appointment without the recommendation of the Chief Justice of India.

Thus the Supreme Court has totally excluded the prerogative of the Executive in the field of appointments to the higher judiciary. Now the situation is such that the Supreme Court Judges make their own appointments and that of the Judges of different High Courts. Nowhere in the world is such a method of appointment prevalent. It is in conflict with the Constitution. The executive is maintaining silence on this aspect. The wresting of initiative from them by the Supreme Court has not become any matter of concern to the executive. They can overturn the decision of the Supreme Court, but they do not appear to be thinking in that direction. This is definitely a dangerous trend. The Judges of the Supreme Court should not have the final say in the appointment of Judges of the Superior courts. It lacks objectivity too. The Supreme Court has justified this process in the name of maintaining independence of the Judiciary. According to the Supreme Court, the Judges, if appointed only by the Executive, may not be independent of the Executive, which is their appointing authority. They also felt that they would be looking towards the Executive for guidance or wait for their signals. It is a ruse for the Supreme Court to usurp the authority of appointments of the

superior Judiciary. It cannot be said that the present judiciary is more independent than those that were appointed prior to 1982 or 1994 or 1998. The independence does not spring from the source of appointment. It depends upon the character of the individual, his or her integrity, wisdom, way of approach, commitment to the Constitutional philosophy and sense of justice. If a person's integrity is unshakeable, moulded in a steel frame, undeterred by any pulls and pushes, uninfluenced by money or favouritism, no force on earth can bend him. Without searching for such persons, the concerned authorities find the said caliber in their own family, if available, or from their community or among relatives of earlier Judges. It has become almost a practice to make the son of a Judge a Judge of the Superior Courts. They move ahead by selecting a person at a very young age to ensure a long stay for him at the top post of Chief Justice. Making a member of the so called higher castes a Judge has almost become an assured practice. The situation has not improved even after the Second Judges Case. The reason they indicated in the Second Judges Case for their assumption of power, in the matter of appointment of Judges to higher judiciary runs as follows:

"... to have an independent judiciary to meet all changes, unbending before all authorities and to uphold the imperatives of the Constitution at all times, thereby preserving the judicial integrity, the person to be elevated to the judiciary must be possessed with the highest reputation for independence, uncommitted to any prior interest, loyalty and obligation and prepared under all circumstances of eventuality to pay any price, bear any burden and to meet any hardship and always wedded to the principles of the Constitution and ' Rule of Law'. If the selectee bears a particular stamp for the purpose of changing the cause of decisions bowing to the dictate of his appointing authority, then the independence of Judiciary cannot be secured notwithstanding the guaranteed tenure of office, rights and privileges, safeguards, conditions of service and immunity..... The independence of judiciary is inextricably linked and connected with the constitutional process of appointment of Judges of the higher judiciary. To expect an independent judiciary when the power of appointment of Judges vests in the Executive is illogical....Hence, the conclusion that the exclusion of the final say of the Executive in the matter of appointment of Judges is the only way to maintain the independence of judiciary..."

It appears that the Judges are no more independent than they were before the Second Judges Case. The power the Supreme Court wrenched

from the Executive, instead of giving them more independence from the Executive, has helped in developing a tendency of exclusiveness and a spirit of autocracy in the matter of appointment of Judges to the higher judiciary.

The Composition

The malady with which the Supreme Court is afflicted is not the lack of independence, but its isolation from social realities. Like any other branch in Indian Administration or any field of activity in Indian society, the Supreme Court is not immune to caste prejudices. The very composition of the Supreme Court reveals not only the monopoly of a very few limited higher castes, but also the hostility towards Backward Classes, more particularly the Scheduled Castes and Scheduled Tribes. Only after the passage of three decades of the Supreme Court, there appeared a Judge belonging to the Scheduled Castes on the Bench. At the completion of sixty years, one can find only four Judges who could become Supreme Court Judges. Only one belonging to the Scheduled Tribes, from a North Eastern State, could get that coveted place,. There have been only seven women Supreme Court Judges until now. Muslims and Sikhs could get some representation but not Christians. In the beginning there was a great representation of Brahmins and subsequently it was shared by Kayasthas, Vaishyas and other top castes in the hierarchy. Unless the Supreme Court reflects the plural character of Indian Society, there cannot be a uniform application of justice. The Supreme Court maybe largely dispensing justice irrespective of caste, creed, religion and region, but there are areas where it will also be influenced by the inbuilt caste prejudices in this country. Unless a great effort is made, it is not easy to surpass the age old prejudices. In that direction, multi-caste representation in the Bench would help to overcome the prejudices. The representation of the perspectives from different communities would definitely enrich the overall attitude of the Court and help them reach the high arena of caste-lessness. The attitude of the judiciary will evolve towards equality only with the presence of women and the Scheduled Castes and Tribes.

This view cannot be brushed aside as simply a view with caste overtones. Nor is it a comment that the Supreme Court is caste biased. Since the Judges are also from the same Indian society which is largely afflicted with caste prejudices, they cannot escape those prejudices. They may not carry those prejudices consciously with them to the Bench, but

the influence of the subconscious mind and the Indian psyche, would definitely play a significant role on them. This can be overcome by a plural representation of different communities on the Bench.

The Executive, when it had a total say in the appointment of Judges to higher judiciary, did not make any attempt to give representation to those unrepresented and neglected communities, including women. Even after the collegium of the Supreme Court took over the power, there is no change. The only reason the authorities hand out is that there are no eligible and efficient people from those communities. It is the same old argument which the pundits of 'meritocracy' always repeat. It is a Brahmanical mantra to deny representation to the unrepresented sections. It is needless to say here that this 'mantra' has no scientific or rational basis. On the other hand, it was proved to be a hoax. It is also established that this is nothing but a deep running prejudice and conspiracy. One Chief Justice of the Supreme Court went to the extent of saying that "it is better to keep the places unfilled instead of filling them with unsuitable persons", when the President of India sent a letter to the Chief Justice to see that the claims of eligible persons belonging to Scheduled Castes and Scheduled Tribes and women are considered in the appointment of Judges to the higher judiciary. Such is the extent of prejudice that a Chief Justice nurtures. It is not only a vituperative comment, but also a sad reflection of the Indian Judicial administration which has failed to produce even one or two capable persons belonging to those communities to become Judges of the Supreme Court. This sentiment is being echoed in the country in many quarters.

We are compelled to address this question, because the country, even after after so long since the commencement of the Constitution, could not render social, economic and political justice to all its citizens equally. The Supreme Court, which is the custodian and interpreter of the Constitution, could not replenish itself with equality and equal opportunities. This need was also felt by the Supreme Court when it was considering the Second Judges Case:

"...Indeed the Central Government which is accountable to the people should have the right of suggesting the names of the suitable candidates with sterling character for consideration to the Chief Justice of India for judgeship of the Supreme Court and to the Chief Justices of a State to that High Court. Similarly, the State Government which is also equally accountable to the people should have the right to suggest the names

of candidates for consideration to the Chief Justice of its State. This is to widen the choice of candidates, give representation to candidates of hitherto neglected sections, groups or depressed classes and women and include such other meritorious legal practitioners who do not normally practise before the Chief Justice or his consultees... If the vulnerable sections of the people are completely neglected, we cannot claim to have achieved real participatory democracy. Therefore, there is every justification for the government to forward lists of candidates belonging to diverse sections of the people to the Chief Justice concerned, who has to ultimately scrutinize the list and take his decision on the merit of the candidates without giving room for any criticism that the selection was whimsical, fanciful or arbitrary or tainted with any prejudice or bias..."

It will be instructive to consider the prevailing views in this matter, both in Great Britain and United States of America, since the Constitution has adopted a middle course in the matter of appointment of Judges, including the Chief Justices of higher judiciary.

Experiments in other Countries

Prof. Rodney Brazier (1998), writing about 'Reshaping the British Political System' says "...The entire judiciary in England and Wales owes its appointment to one, and occasionally to two, politicians... It is notorious that the present system produces few women and ethnic-minority judges" (p. 172-173).

In 1911, Winston Churchill (then Secretary of State for the Home Department) told the House of Commons that [Churchill 1911] "The courts ... in criminal cases, and in civil cases ... deserve and command the respect and admiration of all classes ... but where class issues are involved... it is impossible to pretend that the courts command the same degree of general confidence. On the contrary, they do not, and a very large number of our population have been led to the opinion that they are, unconsciously, no doubt, biased". David Pannick (1987) says, "Judges are subject to the same ambitions, passions, prejudices and fears as their contemporaries. If you prick them, they bleed. However high the general standard of judicial competence, there will always be human weaknesses which affect judgment... All Judges are necessarily influenced in the decisions they make by their upbringing and experience..." (p. 17). He was recalling what the learned Justice Jackson of the U.S. Supreme Court had observed in 1952: "... men who make their way to the bench

sometimes exhibit vanity, irascibility, narrowness, arrogance and other weaknesses to which human flesh is heir ..." (Pannick, 1987, p. 18). In 1921, Lord Justice Scrutton noted that "Judicial impartiality is difficult to attain" (p. 8). On the role of the U.S. Supreme Court in Black Politics, Hanes Walton Jr. (1972), quotes Prof. Samuel Cook:

"Until recent decades the Supreme Court twisted and emasculated and nullified the privileges, rights and immunities of Negroes and placed great power, prestige and moral authority behind the incubus of racism. It justified the relegation of Negroes to an inferior order of existence in conformity with the dogma of white supremacy and therefore contributed mightily to their dehumanization... in light of the unknowns of history, the Supreme Court does not deserve total allegiance from black people" (p. 172).

Mark V. Tushnet (1994), discussing cases dealing with segregation the U.S. Supreme Court, says: "... Reaching segregation cases, Rehnquist wrote "..the court is... being asked to read its own sociological views into the Constitution..."" (p. 190). Michael K. Brown et al (2003)., in their book on race, mention that "... The authority cited by Justice Taney in his 1857 Supreme Court ruling was that the Constitution, the courts at every level, the Federal Government and the States all routinely denied blacks equal access to citizenship..." (p. 26). The authors further write: "... Twenty five years ago Alan Freeman documented how, after a brief period of attention to what he called a 'victim perspective' in the jurisprudence of equality, the court moved decisively to adopt a 'perpetrator perspective' on issues of race" (p. 37). They add "... The law and legal culture remain critical tools for dismantling racial inequality. But the law today does not speak from a genuinely color-blind vantage point. Despite having completed the vital task of eliminating Jim Crow racial classifications, legal institutions still operate with a perspective that remains perceptually, analytically and functionally color-coded. The color is white" (p. 58). They continue: "... The best research now available, in short, confirms – repeatedly – that race still influences whether someone who comes before a court will be sent behind bars, and for how long. It is not the only factor that matters, nor even the most important variable. But race remains the significant issue" (p. 147). Assessing Brown at 50, Michael J. Klarman (2004) writes that "...Brown mattered but it did not fundamentally transform the nation, Supreme Court decisions never do. The Justices are too much a product of their time and place to launch social revolutions."

It may not be out of place to quote Franklin D. Roosevelt, the President of the United States, in his radio address on the proposed Court packing plan in 1937 on March 9, 1937 "...We have reached the point as a Nation where we must take action to save the Constitution from the courts and the courts from itself. We must find a way to take an appeal from the Supreme Court to the Constitution itself. We want a Supreme Court which will do justice under the Constitution – not over it. In our courts we want a government of laws and not of men." This excerpt is taken with a view to establish the need to change the composition of the Supreme Court, in order to provide an equitable and just representation to the much neglected sections of the society including women.

When the experience in England and U.S.A. reveal such an alarming prevalence of racial discrimination and class outlook, one can understand what the situation would be in India, with its deep rooted caste prejudices. Since the application of the Constitution is to be supervised by the Supreme Court, much depends upon the Judges who administer justice. The Supreme Court is much worried about the method of appointment of Judges of the higher judiciary. They were competing with the executive for primacy and supremacy in this regard. But they are not interested in its composition. They do not think about the representation of various neglected and unrepresented sections. The Supreme Court is not willing to provide reservations in the appointment of Judges to the neglected sections. Except for providing reservations in the appointments, in the existing social system, there is no other way of providing representation to those sections. It is the only time tested method. The Supreme Court says simply that there are no suitable candidates. How can capability and suitability, or for that matter efficiency be achieved, unless an opportunity is provided? If advocates belonging to these sections are appointed as Government Pleaders or Attorneys representing the affairs of the State and Central Government, they will get an opportunity to master the craft and gain efficiency. When such people, after considerable standing, are appointed as Judges, they will get further opportunity to participate in the administration of justice. A Judge of a High Court, who has five years of experience, can be appointed as Judge of the Supreme Court, as per the Constitution. In such circumstances, he will be provided with more opportunities to interpret the Constitution and in the process, if he acquire sufficient seniority he can be appointed as Chief Justice. If no opportunity is provided, no one gets an occasion to prove their ability.

Unfortunately, in this country, the legal profession, since the beginning has become the exclusive preserve of upper castes, that too, of only a few castes in the hierarchy. Only the progeny of those castes are able to flourish and monopolise the profession. Not only does the clientele, which places confidence in the upper castes, encourage such people, but also the Judges, who come from those castes, encourage them and give them a push. Thus, sons of leading advocates are becoming Judges, and sons of Judges are becoming Judges. One can perceive mutual appreciation and help amongst those few upper castes. It has become a closed circuit affair. There is no way to break the system, except for the State to start patronizing the neglected sections of the society.

Regarding efficiency, we can safely say that the winning or losing of a case does not solely depend upon the efficiency of the advocate. It depends upon the inherent strength of the case. Application of law is based upon the relevant statutes and established judgments of the Supreme Court. The presentation of the case depends upon the opportunity one gets. If efficiency is the only criteria, then how come the government is losing so many cases? How come former Chief Justices of the Supreme Court decry corruption in judiciary, including the higher judiciary? We find only degrees of difference in the corruption. If competence is the sole criterion, how come several judgments are being reversed, day in and day out? How come the judgment of two Judges are reversed by three Judges, and of three, by five Judges, of five by seven Judges, of seven by nine Judges and so on?

Taking all these factors into consideration, the executive must evolve a method to provide representation to those neglected communities. England had shown the way by establishing a Judicial Commission. Prof. Brazier (1998), writing about 'A New Agenda for Democracy' tells us:

"...It is hard to think of a more important issue than the selection of those who are to judge over their fellow citizens." He goes on to say that Judges must be people of integrity, independent of government and free of any kind of social or political pressure. According to the paper, since the system of selecting Judges did not satisfy those considerations in particular, there was no reason to continue with 'a patently anachronistic method' of appointing Judges or 'to continue to fail' to provide proper training and support for Judges. So Labour reiterated its commitment to the creation of an independent Commission, now to be styled a 'Judicial Appointments and Training Commission'. He was referring

to the necessity of such a commission because "The development of a strong equal opportunities policy and the encouragement of all those groups currently underrepresented on the bench would be important goals of new Commission...."

David Pannick (1987), discussing the English experience said:

"...Today, judicial appointments are not made on a corrupt or politically partisan basis. But the methods adopted continue to suffer from major defects which harm the public interest.....Judges are chosen without any public discussion of their identify let alone of the merits or defects of the candidates. Their appointments receive little, if any, public comment.... The system has the considerable danger that a person whose views are unattractive to Judges or to leaders of the profession may fail to achieve the judicial status which his talents deserve..."

Those are the changes expected in both England and U.S.A. In such a situation, it is more essential in India to bring in changes in the appointment of Judges to higher judiciary. The only way forward is establishing a National Judicial Commission, with representation of the neglected and unrepresented communities, including women, and providing reservations in appointments to the higher judiciary. Without this, it is impossible to give representation to diverse communities or to break the monolithic, impregnable and closed structure of the higher judiciary. The present situation is not that which prevailed in 1950, at the advent of the constitution. Several emerging sections are demanding their participation and due share in the administration of the Nation, including administration of justice. It is no more possible or practicable to deny their aspirations and legitimate demands. Intellect is no more the preserve of the upper castes. The time has come to recognize and provide representation to the unrepresented sections of society. The Constitution has also promised equal opportunities. Providing representation and bringing those communities to the national stage of dispensation of Justice is not only good for the neglected sections but is good for the Nation too. It is in the Nation's interests.

Amendment of the Constitution

The power of Parliament to amend the constitution and the procedure thereof, is provided in Article 368 in Part XX of the Constitution. Originally this Article was titled "Procedure for amendment of the Constitution". In the process of amending the Constitution, there erupted some confrontation between the Executive and the Supreme Court. When the power of the Parliament, in the matter of amending the Constitution, was questioned in *I. C. Golaknath and Others v. State of Punjab* (1967) case and after receiving an adverse judgment, the Parliament came up with the Twenty-fourth Amendment in 1971, asserting its right to amend the Constitution. In that amendment, the title of that Article was changed from "Procedure for amendment of the Constitution" to "Power of Parliament to amend the Constitution and Procedure thereof".

This Article in giving power to the Parliament to amend the Constitution, raised very strong questions regarding the power of the Parliament vis-à-vis the power of the Supreme Court. When the Parliament came up with laws amending certain other provisions, the Supreme Court either reluctantly acknowledged the power or ruled entirely against it. The Parliament, in order to proceed with its social and economic agenda, had to bring out another amendment nullifying the effect of the Judgment. That was again challenged and the Supreme Court, once more, disapproved the act of the Parliament. Ultimately, the Parliament has come out triumphant in establishing its power to amend. The Supreme Court grudgingly accepted the power of Parliament to amend the Constitution with little modifications.

According to Article 368, the Parliament can amend any provision of the Constitution by way of addition, variation or repeal. The only requirement is that, while amending the Constitution, the Parliament has to follow a certain procedure, prescribed in the very same Article. The Parliament, thus it is seen, can amend any provision according to the procedure. It is something similar to Article 21, whereunder the

State can deprive any person of his life and personal liberty, but the only requirement is it should be done according to the procedure established by law. For Article 21, no procedure is prescribed in the Constitution, but it is left to the executive to make any other law, prescribing the procedure in depriving any person of his life and personal liberty. But in the case of amendment to the Constitution, the Constitution took much care in prescribing a procedure in the Constitution itself. The executive cannot fix any procedure of its will, but it has to follow the procedure prescribed. The Constitution did not want to leave that right to the executive.

The procedure prescribed under the Constitution is three fold: One, by a simple majority; two, by a majority of not less than two-thirds of the members of the House present and voting and the third, by ratification of the amendment by not less than one half of the States.

Let us now consider what the Constituent Assembly originally formulated. There was a good amount of discussion on this subject. Replying to the debate, Dr. Ambedkar detailed how the power and procedure for amending the Constitution is contained in different constitutions in the world, particularly of the Constitutions of Canada, Ireland, Switzerland, Australia and United States of America. Taking up the Draft Constitution, Dr. Ambedkar explained the three different methods adopted for amending the Constitution. Summing up his answer, Dr. Ambedkar said (CAD 1949-09-17, 9.143.600, 9.143.603):

"...The Constitution is a fundamental document. It is a document which defines the position and power of the three organs of the State – the executive, the judiciary and the legislature. It also defines the powers of the executive and the powers of the legislature as against the citizens, as we have done in our Chapter dealing with Fundamental Rights. In fact, the purpose of a Constitution is not merely to create the organs of the State but to limit their authority, because if no limitation was imposed upon the authority of the organs, there will be complete tyranny and complete oppression. The Legislature may be free to frame any law; the executive may be free to take any decision; and the Supreme Court may be free to give any interpretation of the law. It would result in utter chaos... If we agree that our Constitution must not be a dictatorship but must be a Constitution in which there is Parliamentary democracy where Government is all the time on the anvil, so to say, on its trial, responsible to the people, responsible to the judiciary, then I have no

hesitation in saying that the principles embodied in this Constitution are as good as, if not better than, the principles embodied in any other parliamentary constitution."

As noted earlier, the Constitution has been amended, by this time, 94 times, with some more on the anvil. Some amendments which are introduced in the parliament were not discussed and they were either allowed to be lapsed because of the expiry of the period for consideration of the Parliament or about to be taken up for consideration. Out of all amendments, some are routine affairs to satisfy administrative requirements and a few were very crucial and their consideration sent tremors in the democratic setup. The Constitution is a democratic constitution and democracy implies equality, not just rule of majority. The Constitution aims at providing equality and equal opportunities. In achieving those objectives, the executive took up some measures. One such measure is providing an assured percentage of seats in admission into the educational institutions for students belonging to Scheduled Castes and Scheduled Tribes, which was a practice from the 1935 Act, which was not questioned by any one, and was being continued even under the new Constitution. This measure was challenged on the ground of equality. The Supreme Court held that such measure was unconstitutional. The Supreme Court gave a different interpretation to the word 'equality'. It ignored the connotation of the word 'equality' and the purpose of the measure, which was under attack. The Supreme Court missed the aspect that any differentiation, if at all it is manifest, is only aimed at removing disparities and bringing equality. The meaning of a word should be in accordance with the context in which it is used, the purpose intended and the aim conveyed. Since language is a way of communication it should vary with the situation which the word wants to communicate. Particularly the word 'equality': it is neither static, pedantic nor abstract. It flows with the sea of humanity. Since the said measure was set aside by the Supreme Court, the executive came up with the First Amendment in the very first year of the functioning of the Constitution. This battle of declaring a measure taken up by the Executive as unconstitutional and the Executive, in order to wipe off the effect of the judgment of the Supreme Court, coming up with an amendment to the Constitution has continued till date. The other important amendments which brought about clashes between the Parliament and the Supreme Court are related to property and the electoral process of the top posts in the democratic set up.

When the First Amendment was questioned, whereunder a legislative measure relating to property rights was under attack, the Supreme Court in Shankari Prasad Case held that an amendment Act, passed in the exercise of power conferred by Article 368, is not a law within the meaning of Article 13(2). This view was confirmed by the Supreme Court in the *Sajjan Singh v. State of Rajasthan* (1964) case. The result of the two decisions is that the power conferred under Article 368 is absolute and it can amend the fundamental rights also. But this view was overruled by the Supreme Court in the Golaknath case. It was held in this decision that the word 'law' in Article 13(2) would not only cover a legislative measure but also a constituent measure and declared that Parliament had no power under Article 368 to make any law taking away or abridging any of the fundamental rights under Part III of the Constitution. In this case, the Supreme Court also proceeded on the ground that Article 368 related only to the procedure for amending the Constitution but not to amend it. The Constitution (24th Amendment) Act, 1971, was passed to get over this decision. The 24th Amendment Act expressly empowers the Parliament to amend any provision of the Constitution including those relating to Fundamental Rights and further, makes Article 13 of the Constitution inapplicable to an amendment of the Constitution under Article 368. By this constitutional amendment, the Parliament affirmed its supremacy in bringing amendment to the Fundamental Rights without any restriction. It can, now, amend any provision in the Constitution. It is made clear that Article 368 not only prescribes the different procedures for amending the Constitution, but also confers power to amend. The constituent power in the Parliament is affirmed. By this, the Parliament has a dual role to play: one, that of the House elected by the people, and the other of the Constituent Assembly, in bringing about amendments to any provision of the constitution. This dual role was also played by the Constituent Assembly.

This Amendment Act, along with the 25th and 26th Amendment Acts,was again challenged. Those amendments, including the first amendment were brought in, in order to bring progressive legislations in landholding and land reforms. The first such legislation which faced a challenge was the Land Reforms Legislation brought in by the State of Kerala. The others related to Punjab, Bihar and Rajasthan. Till 1967, the Supreme Court confirmed the power in Parliament to amend the Constitution. The Executive took further precautions to see that such reform legislations should not be challenged by the landed gentry, by including those legislations in the 9th Schedule by providing a

Constitutional protection and making them immune to attack in courts. As long as the decision rendered in the Golaknath case is held to be valid, and until it is not overruled by a subsequent larger Bench of the Supreme Court, it holds the field and any legislation which incurs the wrath of the Golaknath ruling, will be rendered invalid. Therefore, there arose a necessity for testing the Golaknath case. The opportunity came in the *Kesavananda Bharati v. State of Kerala* (1973) case. In this case, several petitions were filed in the Supreme Court assailing the 24th, 25th and 26th Amendment Acts. The march of the Executive in a direction marked by the Preamble as well as the Directive Principles of the Constitution was halted by the Supreme Court in the Golaknath case. But this was reversed by the Kesavananda Bharati case. The decision in the Golaknath case was rendered by 11 Judges by a majority of 6:5, and the decision in the Kesavananda Bharati case was rendered by 13 Judges, who acknowledge the power of the Parliament to amend any provision including Fundamental Rights and Article 368 itself, but invented a theory of 'Basic Structure' of the constitution. In fact, this concept of 'Basic Structure' was also referred to and considered in earlier cases, but a concrete and firm expression was given only in the Kesavananda Bharati case.

In this case, the Kerala Land Reforms Act, 1963, was challenged. The case was referred to a large bench. Though it was also aimed at reconsidering the Golaknath case, the main purpose was to consider the extent of the amending power conferred by Article 368 of the Constitution apart from Article 13(2) on Parliament. The three Constitutional Amendments were held to be valid. This judgment approves the power of the Parliament to amend every part of the constitution including Fundamental Rights. But the only restriction imposed is that the Parliament cannot amend the essential features of the Constitution—this was termed as the theory of the 'Basic Structure'. In view of this theory, the Parliament cannot amend the 'Basic Structure' of the constitution. Even this limitation on Parliament was placed by only 7 Judges as against 6 Judges. By only a wafer thin majority, this limitation was imposed on the Parliament.

Those Judges who did not invoke the theory of 'Basic Structure' have conceded wide and unrestricted powers to the Parliament to amend any Article in the Constitution, except to totally abrogate it. The 'Basic Structure' is not defined in the Constitution, nor does any indication of it appear anywhere. This theory was invented by the Supreme Court by drawing inspiration mostly from the Preamble. Essential features of the

Constitution were already identified by the Constituent Assembly. Out of them, the Supreme Court in the Kesavananda Bharati case recognized some and converted them into the 'Basic Structure'. Subsequently, drawing inspiration from the 'Basic Structure' theory, it went on adding other features, which in their view are essential, to the list of of 'Basic Structure Theory'. The 'Structure' is being extended and widened. If this concept of 'Basic Structure' theory is accepted and followed, the arena of legislation will slowly be eroded and shrunk. The power to legislate will be reduced.

Now the Parliament cannot come up with a legislation on any aspect which the Supreme Court has found and identified as an essential feature of the Constitution. If this is continued, it will propel grave consequences to the power of the Parliament and the Legislatures of the States, because the field of Legislation is being slowly circumscribed. The Supreme Court itself, at least six Judges out of thirteen, approved the power of Parliament when they said "...there are no implied and inherent limitations on the power of amendment. The power to amend is wide and unlimited.... There can be or is no distinction between essential and inessential features of the Constitution to raise any impediment to amendment of alleged essential features. Parliament in exercise of constituent power can amend any provision of the Constitution and that the power is wide and unfettered..."

The Constituent Assembly also did not impose any limitation on the power to amend the Constitution. By invoking the theory of 'Basic Structure', the Supreme Court cannot restrict future Parliaments from bringing any radical changes in the areas identified as essential features. No generation has any right to restrict, in any way, the future generation. Each generation must be left to its own wisdom to bring in any necessary changes, which time demands. The People of India gave the Constitution unto themselves. Therefore, the People of India, at any time, can amend any part of the Constitution. They will be at liberty to replace the Constitution, if they feel, when they think that it impedes the progress of the Nation. There must be an open declaration and preparedness for it. If the people are not permitted to bring any fundamental changes, democratically, then they will resort to revolutionary methods.

The Constitution, particularly, the "Directives" are revolutionary in character as against the feudal legacy of Indian society. Merely asking for implementation of the "Directives" or insistence upon the fulfillment

of the promises made in the Preamble itself, has become revolutionary and objectionable to the class oriented Executive. Asking for equality and equal opportunities has become unacceptable to the caste-ridden Hindu oligarchy. Asking for removal of disparities and exploitation has become a threat to the upper caste-upper class axis and has raised alarm in them, and in turn, they raise the bogey of communism. That is why they have successfully destroyed the public sector and are encouraging the private sector. The Supreme Court also, often in the hour of need, comes to the rescue of this class, but is ambivalent towards the "Directive Principles". It held out a caution that the Directive Principles should not eat away the Fundamental Rights. In fact, there is no dichotomy in the Fundamental Rights and Directive Principles. They complement each other. In such circumstances, if the Supreme Court lays down the theory of "Basic Structure", it will be impossible for the poor, deprived and downtrodden to get the alluring equality and equal opportunities and to realize the dream of sharing the Nation's wealth and resources equally with other citizens.

With reference to the "Basic Structure" theory, the Supreme Court made another distinction between an 'integral part' of the Constitution and 'essential feature' of the Constitution, in the *Raghunathrao Ganpatrao v. Union of India*, (1993) casesaying: "...Our constitution is not a disjointed document. It incorporates a particular socio-economic and political philosophy. It is an integral whole.... To say that a particular provision or a particular 'institution' or concept is an integral part of the Constitution is not to say that it is an essential feature of the Constitution. Both are totally distinct and qualitatively different concepts".

Espousing the Basic Structure theory, the Supreme Court in the Kesavananda Bharati case, declared that the basic foundation is dignity and freedom of the individual, the sovereignty of the country, the Republican and Democratic character of the Constitution including the unity of the country; justice – social, economic and political; liberty of thought and expression, belief, faith and worship, equality of status and of opportunities, secularism, periodical free and fair elections—all of which are considered to be the essential elements of democracy along withrule of law and judicial review;independence of judiciary, separation of powers.

During the turmoil of the Emergency, the Constitution (39th Amendment) Act, 1975 was introduced amending Article 329 and

inserting Article 329-A. Through this Amendment, the forum for adjudicating upon an election dispute relating to the Prime Minister and Speaker of the Lok Sabha, was abolished. When this was challenged, the Supreme Court in the *Indira Nehru Gandhi (Smt.) v. Raj Narain & Another* (1975) Case, struck down the said amendment and held that the particular Article which was introduced by a Constitutional amendment violated the principles of free and fair elections which is an essential postulate of democracy and which in turn, is a part of the basic structure of the Constitution, that it damaged the essential feature of democracy, and was an outright negation of the Right of Equality. This Article was repealed by the Constitution (44th Amendment) Act, 1978. Another attempt was made to further amend the Constitution by conferring more powers to amend the role of the Judiciary by the Constitution (42nd Amendment) Act, 1976. By this amendment, two clauses were introduced to the effect that no amendment shall be called in question in any court on any ground and that there shall be no limitation whatsoever to amend the Constitution. These amendments were challenged in the *Minerva Mills Ltd. and Others v. Union of India*, 1980 case and the Supreme Court struck down these two provisions by holding that it "... is beyond the amending power of the Parliament and is void since it damages the basic or essential features of the Constitution and destroys its basic structure by a total exclusion of challenge to any law... deprives the Courts of their power to call in question any amendment of the Constitution..." It is very interesting to note that Minerva Mills, a limited company owning a textile undertaking, approached the Supreme Court when the Mills were nationalized and taken over by the Central Government under the provisions of the Sick Textile Undertakings (Nationalisation) Act, 1974.

In this decision the Supreme Court was tempted to pronounce judgment on the aspect of justiciability of the Proclamation of Emergency by the President of India. The court held that "...it is true that so far there is no decision of this court taking the view that the validity of a Proclamation of Emergency can be examined by the court..." Major challenges to the constitutional amendments came from the propertied class and from those who opposed land reforms. The power to amend the constitution was also decided in cases filed by these categories. The Golaknath case and the Kesavananda Bharati case are of such nature, which were decided by a very slender majority. The decision in Golaknath case (6:5) was reversed in the Kesavananda Bharati case (7:6). The view taken in the Kesavananda Bharati case was supported by the Minerva Mills case (5

Judges) This view holds the field. By interpreting the power to amend thus, the Supreme Court, it appears is more jealously guarding the right to property, though it is no more fundamental, than protecting the right to life, which is fundamental. The Supreme Court very generously interferes even in payment of compensation to the property acquired for public purpose under a valid law.

Though the Directive Principles are held to be fundamental to the governance of the country, the Supreme Court is not prepared to give primacy to the Directive Principles over Fundamental Rights in exceptional circumstances. The Fundamental Rights relate to individual rights, whereas the Directive Principles are aimed at the welfare of the Nation. When the entire gamut of Fundamental Rights can be restricted under a law, there cannot be any objection to restrict or control the fundamental right of a citizen against the welfare of the society. If, in a given case, there arose a clash between the two, it should be more just if the individual right is sacrificed in the larger interests of the society. The Supreme Court is not considering the fact that unless the Directive Principles are implemented, the Fundamental Rights cannot be protected, or the citizen may not be in a position to enjoy any of the Fundamental Rights guaranteed particularly in Articles 14, 19 and 21. This dichotomy was sought to be explained in the Kesavananda Bharati case, by a learned Judge thus:

"... It was said that the Constitution-makers never intended that Fundamental Rights should be subservient to Directive Principles and that they visualized a society where the rights in Part III and the aspirations in Part IV would co-exist in harmony. A succeeding generation might view the relative importance of the Fundamental Rights and the Directive Principles in a different light or from a different perspective. The value judgment of the succeeding generations as regards the relative weight and importance of these rights and aspirations might be entirely different from that of the makers of the Constitution. And it is no answer to say that the relative priority value of the Directive Principles over Fundamental Rights was not apprehended or even if apprehended was not given effect to when the Constitution was framed to insist that what the Directive Principles meant to the vision of that day, it must mean to the vision of our time."

In this context, it is pertinent to note that another learned Judge of the Supreme Court held in the same judgment that "...in Dr. Ambedkar's

view the nationalization of property is included in the word 'distributed' in Article 39(b)." If such is the case, when the percentage of landless labour is so alarmingly increasing and thousands and thousands of acres of cultivable land are being served on a silver platter to industrialists in the name of Special Economic Zones, or several small and marginal land holders are being divested of their only source of livelihood or thousands and thousands of people are displaced from their small and tiny hutments and houses for the purpose of projects, the Directive Principles cannot remain silent. Another shocking aspect as far as the apathy of the Executive in implementing the Directive Principles is that even after decades of existence of the Constitution, several thousands of people are still removing human excreta with their hands and carrying night soil on their heads, though an Act was made to abolish the system. It is nothing but a national shame.

In giving effect to the Directive Principles, the Supreme Court is taking much care to ensure that, in the process, not even one single individual's fundamental right is affected. But, on the other hand, the Supreme Court approves the action of the Executive in depriving the right to life of several thousands of people in order to benefit one single individual in the name of economic growth. In the field of human dignity, the Executive evinces little interest while the judiciary expresses sympathy and closes the claim saying that it has no power to mandate the Executive to implement the Directive Principles. The Bhopal Gas tragedy is a sad reminder of the functioning of both the Executive and Judiciary. Even after a long period of harmonious working of the Constitution, the blend of Fundamental Rights and Directive Principles could not be achieved. By bringing more issues into the fold of 'basic structure', the Judiciary is restricting the field of play of the Executive. As a matter of fact, there is nothing like permanence of essential features of the Constitution. Even the basic structure needs some modification, depending upon the situation. By asserting the power of judicial review over executive and legislative action, the Supreme Court has become a super body over the other two branches. This is not a happy sign for democracy and representative government. It is apt to note the opinion of William Gangi (1993): "...By both usurping the legislative and amending powers and deceiving the public, the Judiciary today undermines government competency as surely as would have the anti federalists...."

This was not always the situation with the Constitution and the Supreme Court. When the Executive attempted to mutilate the Constitution, the

Supreme Court stood against the Executive, upheld the supremacy of the Constitution. The only exception, that too in a time of crisis, was the *Additional District Magistrate, Jabalpur v. S. S. Shukla* (1976) case. A couple of attempts by the Executive to subvert the Constitution through certain amendments were averted by the Supreme Court with its heavy hand. An attempt to confer more powers on the top Executive and legislative branch was also disapproved. Certain aberrations in the executive action, through the President, were also rectified by the Supreme Court by intervening at the appropriate time. Any attempt to uphold any Constitutional provision, by the Supreme Court, appears to be aimed at maintaining the status quo.

A majority of the judgments in the field of property rights, including its acquisition and payment of compensation, in the arena of right to life and personal liberty, in the area where certain fundamental rights are restricted in imposing reasonable restrictions, do appear that the Supreme Court , by and large, appears to be on the side of maintaining status quo. The care which the Executive and Judiciary took in the early days of independence, may not be necessary in the changed circumstances. The laws which were promulgated during the days of turmoil or emergency need not be continued and the executive terror need not be encouraged by the judicial umbrella. The executive is becoming more and more autocratic by severely interfering with the citizens' rights and in such circumstances, the Judiciary should be more vigilant and should see that the rights of the citizens are not trampled upon by the policing State in the name of maintenance of law and order or internal security. The executive should realize that the increase in violence and violent activity, or terrorism, or extremism, is not because of the allegiance of some towards violence or extremism, but because of the failure of the Executive Machinery in removing disparities, mitigating poverty, and the non-availability of basic needs like food and shelter.

If the Directive Principles are translated into administrative measures and transfused into the successive five year plans, things would be different and the people will be in a position to really enjoy the Fundamental Rights. An empty stomach cannot relish the right to speech and expression. When the right to demand basic needs is curtailed by the heavy foot of the Executive, there is no meaning in offering a fundamental right. Keeping the situation prevalent in this country in view, the Welfare State is visualized and to achieve that goal, the 'Directives' are handed out. When such 'Directives' cannot be insisted upon in the name of

'Justiciability' there is no way to achieve the Welfare State and realize the lofty ideals adumbrated in the Preamble.

The Neglected Citizens

There are certain parts in the Constitution which did not receive the attention they deserve. Both the Executive and Legislature did not pay much attention to those parts. The representation from those sections, either in the Parliament or in the State legislatures is very little and unassertive. Those parts remained backstage and the people under those areas are deprived of the benefits of the Constitution. Though the Constitution envisaged special attention towards those areas, they remain neglected. Schedules V and VI are two such Chapters. The special care and attention towards those areas were initiated during the British time, through the Government of India Act, 1935, and are continued in the Constitution of India. Still, there is no appreciable change in the lives of those people even after so many years.

Schedule V contains provisions relating to the administration and control of Scheduled Areas and Scheduled Tribes, whereas Schedule VI contains provisions relating to the administration of Tribal Areas in the States of Assam, Meghalaya, Tripura and Mizoram, otherwise known as the North-Eastern States. One part of the Schedule deals with Scheduled Areas and another deals with Scheduled Tribes. The Fifth Schedule is incorporated in the Constitution in accordance with Article 244 which deals with administration of Scheduled Areas and Tribal Areas. The Sixth Schedule is incorporated in accordance with Article 244(2), which says that provisions of the Sixth Schedule shall apply to the administration of tribal areas in the State of Assam, Meghalaya, Tripura and Mizoram. A special scheme is evolved for the administration of the areas covered under these schedules.

According to the Fifth Schedule, the Governor of the particular State wherein the Scheduled Areas lie and the Scheduled Tribes reside, is entrusted with a Constitutional responsibility. Under this scheme, he has to send an annual report to the President of the administration of the Scheduled Areas in the State, which goes to show that special attention is devoted towards the welfare and betterment of the Scheduled

Areas. The Union Government is also empowered to issue directions to the concerned State Governments in the matters of administration of the Scheduled Areas. In addition to placing of the responsibility on the Governor, the Fifth Schedule also provides for a Tribes Advisory Council. It is the duty of the said Council to advise in matters pertaining to the administration of Scheduled Tribes in the States. These provisions are applicable even in a State where there is no Scheduled Area but only Scheduled Tribes. These provisions empower the President to direct the State Governments to make necessary legislation or issue executive instructions for the welfare of the Scheduled Tribes. The Union Government is entrusted with all necessary powers for the well-being of the Tribes. This was necessitated because of the backwardness of the Tribes and their exclusive habitation away from normal civilization and economic development.

This exclusiveness was identified by the British Government itself and necessary administrative measures were introduced for the advancement of the Tribes and the Scheduled Areas. The Fifth and Sixth Schedules were taken from the Government of India Act, 1935. Prior to the advent of the 1935 Act, the British Government issued regulations relating to the administration of the Tribes and matters relating thereto. The Fifth Schedule corresponds to the 'Excluded Areas' and 'Partially Excluded Areas' contained in the 1935 Act. The Governor is empowered under this Schedule to exclude, if necessary, operation of any legislation including law made by the Parliament, in the Scheduled Areas, or to extend the same with certain modifications. He issues regulations for the welfare of the Tribes, but those have to be granted assent by the President. An important power entrusted with the Governor is that of issuing Regulations relating to land transactions in the Scheduled Areas. He can restrict or prohibit land transfer by a tribe in favour of a non-tribal or among themselves. He can also regulate land allotment to Tribes. Apart from this power, the Governor can issue Regulations for the peace and good government of the Scheduled Area. Another important area covered is that of money-lending in these areas. The Governor can regulate the money lending business. This is envisaged in order to check the unbounded exploitation by money lenders who come from the plains and rob the tribes by advancing money for their daily needs and appropriate their whole earnings including their forest produce. In all these matters, the Governor is endowed with exclusive power to legislate independent of the State Legislature. He is the sole Judge to decide which Regulation is necessary for the well-being of

the tribes and essential for their advancement. The duty of the Tribal Advisory Council is to advise the Governor on matters referred to them. Such was the great care taken up by both the British Government and the Constitution of India.

Though the Governor is given powers to exclude any law from operation in the Tribal Areas or to give effect to their implementation in the said areas, the spate of illegal occupation of the land of Tribals is increasing. In the name of mining operations or constructing big dams, not only is the land of the Tribes being appropriated, but they are also being forced to leave the place of their birth and residence. In addition to this, thousands of families are being displaced from their natural abode in the name of development. In the process of displacement, some of the Tribes are being extinguished. In the name of development and to exploit the largely available minerals in the Tribal and Agency Areas, vast stretches of land comprising hills and hillocks and deep forest are being handed over to industrialists who are always non-tribals, and in the process, thousands of people are being evicted from the place most of the time forcibly, sometimes at gunpoint. The Supreme Court in the *Samatha v. State of Andhra Pradesh and Others* (1997) case, recognizing the land as a security and as a source of economic development held:

"... Land is their most natural and valuable asset and imperishable endowment from which the tribals derive their sustenance, social status, economic and social equality, permanent place of abode and work and living... Therefore, the tribes too have a great emotional attachment to their lands."

Further, commenting on Fifth and Sixth Schedules of the Constitution, the Supreme Court held:

"... the Fifth and Sixth Schedules, an integral scheme of the Constitution with direction, philosophy and anxiety to protect the tribals from exploitation and to preserve valuable endowment of their land for their economic empowerment to elongate social and economic democracy with liberty, equality, fraternity and dignity of their person in our political Bharat... The predominant object of Para 5(2) of the Fifth Schedule of the Constitution and the Regulations is to impose total prohibition of transfer of immovable property to any person other than a tribal for peace and proven good management of a tribal area; to protect possession,

right, title and interest of the members of the Scheduled Tribes held in the land at one time by the Tribals..."

"Prohibiting transfer of immovable property situated in Agency tracts by a person, whether or not such a person is a member of a Scheduled Tribe, unless made in favour of a person, who is a member of the Scheduled Tribe or a society composed solely of the members of the Scheduled Tribes—such transfer of immovable property is prohibited even if it is done by the State Government or its instrumentalities, State Corporations, Corporate aggregate, Corporate sole, partnership firm, or company apart.....".

"....Even in case of transfer of Government land in favour of State instrumentalities or Public Corporations for public purpose viz., for setting up hospital, bank, etc. not prohibited, but in case of such transfer, transferee must contribute out of its profits for social, economic and educational empowerment of the tribals..."

The Supreme Court in that judgment categorically held that "...transfer of government land in Agency tracts by granting mining lease in favour of non-tribal natural persons is null and void..." In spite of this clear and categorical prohibition imposed by the Supreme Court, the State governments are leasing out mines and minerals to non-tribal persons including national and multinational companies.

Exclusive and separate legislative and administrative arrangements are made in the case of Tribal areas in the States of Assam, Meghalaya, Tripura and Mizoram in the Sixth Schedule to the Constitution of India. Under this Schedule, autonomous districts and autonomous regions are established in the tribal areas. The Governor of the State may divide the area of autonomous districts into autonomous regions. This Schedule provides for the constitution of District Councils and Regional Councils, grants power to the said Councils to make laws relating to land, forest, including reserve forest, use of canal water, inheritance of property, marriage and divorce and social customs, among other things. Administration of justice is also specially provided. The Governor has to exclusively confer the application of Civil and Criminal Procedure Codes. Similarly, application of the Acts of Parliament and of the State Legislature is specially provided keeping in mind the situation and circumstances. Special powers are conferred on the District and Regional Councils to deal with the affairs of the administration of the

region and the District and the personal lives of the citizens. This type of arrangement was initiated by the British Government as provided in the Government of India Act, 1935 and the same, with little modifications, is being continued under the Constitution of India. Both the Fifth and Sixth Schedules are incorporated in the Constitution with the sole purpose of taking exclusive care of the Scheduled Tribes. Referring to the administration of these areas, the Supreme Court in *Pu Myllai Hlychho and Others v. State of Mizoram and Others* (2005) case, relating to the State of Mizoram held:

"... it was argued that the tribal areas are to be administered as per the provisions of the Sixth Schedule only. This contention ... cannot be accepted ... The Sixth Schedule to the Constitution is a part of the Constitution and cannot be interpreted by forgetting the other provisions of the Constitution. It is impossible to visualize complete segregation of the Sixth Schedule from the rest of the Constitution. As regards the inclusion of the Sixth Schedule to the Constitution, there is a legislative history, but that by itself is not sufficient to hold that the Sixth Schedule is a 'Constitution within the Constitution'..."

The purpose of incorporating the Special Legislative and administrative arrangement for Scheduled Tribes under the Fifth and Sixth Schedules is to bestow special care towards them, because they reside in an exclusive area, with a different cultural background. At the time of independence and the preparation of the Constitution, the Constitution makers thought that the special treatment of the Scheduled Tribes introduced by the British Government was still necessary for the good governance of the people therein. The whole aim is to bring about fusion of these people with the other parts of the respective States by raising the educational and health standards of the people, keeping the rich cultural heritage flourishing. If the prevalent situation is looked at, the very purpose of the scheme is destroyed. There is a deep rooted feeling of hurt within the Scheduled Tribes that they may not become an integral part of the country physically, and of the Nation, psychologically. The increasing threat to the lives of the people by the forces of the State and the growing feeling of insecurity and the increasing activities of insurgency are an indication of the hurt feelings of the people. The legitimate exercise of their rights including the fundamental rights and the insistence on the guarantee of life and personal liberty from the State's interference are termed by the State as acts of extremism and the lives of hundreds of innocent people are taken away by the State in the name of maintenance

of 'Law and Order'. The special powers given to the Armed Forces have become a licence to kill people. Indiscriminate extra judicial killings have become the order of the day.

Writing about Irom Sharmila, who was on a fast unto death for eight years (at each time of arrest for the fast she undertook, she is being fed through pipes fixed to the nostril) demanding a repeal of the draconian Armed Forces Special Powers Act in Manipur, Deepti Priya Mehrotra (2009), says:

"... As democratic voices failed to influence the Centre and lead to people-oriented development, Manipuri youth grew increasingly frustrated. Already feeling cheated of sovereignty, denial of basic development was like rubbing salt on open wounds. Gross neglect and mis-governance provided fertile ground for the rise of insurgency. Rather than responding at the incipient stages when demands were articulated peacefully, the State routinely ignored popular protests. When their voices fell on deaf ears, people began using violence to assert themselves. This forced the Government to react. The use of violence was actually fostered by Government apathy".

She adds further "...Lack of education and employment, the rampant corruption continues to attract youthful energy to insurgent groups. Many young people perceive it as the only way they can contribute to solving chronic problems that plague Manipur. Atrocities by the Armed Forces have the unintended effect of providing ready recruits for the underground groups."

Perhaps this may be true in almost all areas covered under the Sixth Schedule, with degrees of difference. The situation in the Areas covered under the Fifth Schedule also may not be different. Here also, the Tribal youth are in frustration, despair and disillusionment. The State, instead of addressing the problems and the serious questions thrown up, continues to crush the movements, shutting out legitimate voices. The killings of thousands of youth in the areas under the Sixth Schedule is excused in the name of containing activities of insurgency and the killings of thousands of youth in the area under the Fifth Schedule is excused in the name of curbing Naxalism. The Judiciary only blinks at the extra judicial killings and State Terrorism. It avoids these issues by holding that the security of the Nation is of paramount importance, rather than protecting fundamental rights of individual citizens. The draconian laws

made in the model of the colonial government, imposed on the citizens are given a constitutional leverage in the name of "interests of the State". As long as the State believes that its gun can silence everything then the aspirations of the citizens mostly poor, downtrodden, deprived, unrepresented, under nourished, insecure, illiterate, ignorant, without shelter, neglected and excluded, will not be met and the questions they throw up will remain unanswered. The Constitution does not expect this, nor does democracy tolerate it.

The Missing People of India

The Constitution of India opens with the words "We the people of India". In the name of the people, on behalf of the people, it has been made, drafted, approved and adopted. They have solemnly resolved to constitute India into a Sovereign Socialist Secular Democratic Republic. They had also pledged to secure to all its Citizens, Justice, Liberty, Equality and Fraternity. They gave the constitution unto themselves and it is being passed on from generation to generation. The people expected that the India will be a Welfare State securing for all its citizens the Fundamental Rights including the right to life with human dignity, free from poverty and hunger. They have meticulously laid out the path for developing this land into a democratic country with the help of the Directive Principles.

Like the flow of the Ganges, the mighty river more ancient than the inhabitants of the land, the people are by and large calm and quiet, sometimes restless, suddenly becoming virulent and violent, slashing the banks and swarming into the sea of humanity with all their aspirations and resolutions afloat. If one looks at them, one is perplexed to locate, where are we the people? Are they swirling in the current or are stuck in an undercurrent? Drowning under overreaching waves? Washed away by furious floods? Or what? One thing is certain, no wave, no flood, no storm, no holocaust, could so far quell the indomitable spirit of the people. In all adversities, the people survive, struggle and continue their journey carrying on their unfinished tasks and unfulfilled dreams.

At this point, India is considered to be one of the fast developing countries. "We the people of India" today have swelled and crossed more than 120 billion. On the political side, it is hailed as the largest democracy in the world. The democratic character is measured by the peaceful and periodic elections every five years conducted by an independent body called the Election Commission of India. On the economic side, the country boasts of its huge foreign exchange reserves in spite of global recession. The Finance Minister claims a growth of 7.2 per cent growth in GDP this year. The poor are assured of 100 days of work in a year

under the National Rural Employment Guarantee Scheme. The World Bank annually issues certificates of satisfaction with poverty alleviation programmes. According to latest studies, India holds the sixth rank for billionaires in the world.

Four Indians were among the world's top ten richest in 2008, worth a combined $160 billion. India has fallen to 132 in the new ranking of the U.N. Human Development Index (HDI) of 179 nations. In the index of 2007-2008, India ranked at 128. Now we are at 132. There are at least 836 million Indians living on less than Rs. 20 a day, as per the Government's own report of 2007. Over 200 million get by on less than Rs.12 daily. According to the Government of India, 310 million is the number of people below the poverty line. According to the Planning Commission, 28 percent are below poverty line. According to the Tendulkar Report, the percentage below poverty line is 42. According to the Saxena report, the figure is 50. Such are the varied estimates of poverty. As against this, the Reserve Bank of India (RBI) has concluded the purchase of 200 tonnes of gold from the International Monetary Fund (IMF) at an estimated price of around Rs. 31,490 crores ($ 6.70 billion) under the IMF's limited gold sales programme in October 2009. The Foreign Exchange Reserves held by the RBI was at $285.50 billion as on October 23 2009. While the gold reserves are on the increase, the number of agriculture labourers is also increasing. It rose from 86 million to 106 million in the last decade of 20th Century (1991 to 2001). About half of the farming households are indebted to an extent of Rs. 25,000, on an average. The small and marginal category comprises 84 percent of farmers. 75 percent of them owe money to unofficial lenders. Globally, one in every four people below poverty line is an Indian. India spends nearly Rs. 90,000 crores on poverty alleviation, annually – if the money spent on subsidies is added, the figure would be threefold.

According to one observation, the Indian economy consumes in a year over 1.5 million cars, 12.5 million television sets, 7.2 million two-wheelers, 9.2 million mobile connections with bank deposits soaring to Rs. 4,00,000 crores, yet India is home to the largest number of poor people. India is also home to the world's largest food insecure population with more than 200 million hungry people, according to the India State Hungry Index. According to this study, India which scored 66th place in the 2008 Global Hunger List of 88 countries, does not have a single state in the 'low-hunger' or 'moderate-hunger' categories. According to the Arjun Sengupta Committee Report, 200 million Indians go to bed

hungry every night. This may be because 85 percent of rural households are either landless, sub-marginal, marginal or small farmers. According to the same report, the disadvantaged groups constitute 836 million people or 77 percent of the population. The remaining over 235 million are in a position to take care of themselves. 82 percent of Scheduled Castes and Scheduled Tribes fall in the vulnerable category.

Article 38(2) of the Constitution directs that the State shall strive to minimize the inequalities in income and to eliminate inequalities in status, facilities and opportunities. Article 39(a) directs that the State shall direct its policy towards securing that the citizens, men and women have an equal right to an adequate means of livelihood. In spite of these two directives which are fundamental in the governance of the country, there exists an unbridgeable gap between the rich and the poor. There is a marked difference which defies elimination. The gap, is widening, day by day. The above referred directives are not put to implementation in favour of the deprived and disadvantaged. It is only on the ground that the Supreme Court has no jurisdiction to direct the State to do a particular thing. The deprived are not insisting upon performance of an illusory action, but only that which is available to them in the Constitution. It is approved by the Supreme Court itself that if the State or its instruments or its administrators fail to do an act under a statute or rule, the Court can direct the concerned to perform that particular act, by way of issuance of a writ of *mandamus*. In such case, it is not understandable why in case of failure to follow the directions ensured under the Constitution, they cannot be enforced by way of issuing necessary writs. The very fact of the Prime Minister referring to inclusive growth, proves that the growth so far claimed by the Government is excluding a very major section of the people. It is asserted even by the economists that a mere increase in the quantum of GDP does not itself reflect the real increase in the economy of the people. It is not only the earnings of a particular group that is to be seen, but its capacity to spend and spend on essential items of life, like food and health, that is to be taken into consideration.

In the health sector, the situation is more grim. According to Michael Marmot, the Chairperson of the Commission on Social Determinates of Health, set up by World Health Organisation, "...health is an indicator or marker of how other policies are performing.." According to the World Health Organisation (WHO), 80 percent of the diseases are caused because of lack of safe water and sanitation. Five of the ten top

diseases of children are also related to water and sanitation. Diarrhea causes 1000 deaths everyday in India. As far as non-health implications are concerned, 443 million school days are lost each year due to poor sanitation and hygiene. Only 4 out of 10 girls who enroll complete eight years of schooling in India, because of lack of separate toilets and water, which is a necessity particularly after they attain puberty. Thirty five percent of rural schools do not have toilets. Malnourished children, number 57 million of the World's 146 million; 47 percent Indian children are underweight. According to the WHO and UNICEF Reports, one out of every two persons in the world compelled to defecate in the open is an Indian. 667 million people in this country have no option but to defecate in the open. According to the Arjun Sengupta Committee Report, 45.9 percent of India's children under three are underweight, 39 percent stunted, 20 percent severely malnourished, 80 percent are anaemic and more than 6000 children below five years of age die every day due to malnourishment. According to the WHO, 536,000 women died in childbirth in 2005 in the world and 1/5th of the number were Indians. Preventable diseases continue to account for 50 percent of reported illnesses. Tuberculosis alone takes 400,000 lives each year. Only 44 percent of children aged 12-23 months receive all recommended vaccinations and despite more than two decades of immunization, India still has the largest remaining pool of polio transmission in the world.

The figures and the percentages may vary from year to year, but they keep increasing. An average Indian is expected to be only 29 years old by 2020. In spite of all these adversities, the grit of Indians has continued to be strong and the life expectancy has now increased to 65.4 years in 2009 whereas it was 32.1 years in 1951. We have 29,172 medical graduates in 262 colleges. We have also increased the number of hospitals. In 2009, we have 13,692 hospitals whereas we had 2629 in 1951. Article 39 of the Constitution directs that "..the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength..." Article 47 of the Constitution directs and reminds that "... the State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health, as among its primary duties". In spite of such directives, the present situation is gloomy and appalling. It appears that the State is abdicating its duty and encouraging the private sector to cater to the needs of the people. The over-greedy and profit oriented private sector exploits the situation andrural India and the

urban poor are left at the mercy of the private sector. The fatalist India blames its fate but does not make demands of its Government which assumed power with their very approval, whether voluntary or otherwise.

In the education sector too, the situation is not encouraging. The State claims that there is a remarkable increase in literacy in this country. Maybe true, but the statistics always deceive. The Indian government presents two types of figures, one for the consumption of the citizens, and another for IMF and World Bank or other such International Financial Institutions. If the standard fixed by the UNESCO to measure literacy of an individual is taken, the figures indicating literacy in India may fall further down. The present data available says literacy is 65.38 percent. When compared to 1951, where it was 18.33 per cent, we are definitely improving. But still India has the largest number of illiterate people in the world. According to a UNESCO report, 34 percent of the world's illiterate adults remain in India. The adult education scheme introduced with great fanfare in the1960s, had little effect. The ambitious 'Operation Black Board' of District Primary Education Programme (DPEP) or 'Back to School' also have had no great effect. Instead of making the adults or the children literate, the schemes have become a source of embezzlement for corrupt officials and politicians. No doubt, we have an increased strength of universities at 338, whereas, we had only 25 in 1947. Now we have 17,000 colleges. Article 45 of the Constitution directs that the 'State shall endeavour to provide early childhood care and education for all children until they complete the age of six years. Now Article 21A of the Constitution mandates that the "State shall provide free and compulsory education to all children of the age of six to fourteen years..."The State may avoid Article 45 of the Constitution, since it is only a directive principle, but it cannot avoid Article 21A which is now included in the Fundamental Rights. The State has to necessarily provide education to all children till they attain the age of fourteen. Probably to avoid this too, the State is shifting the burden to the private sector, which has no constitutional accountability. As in the case of literacy, the girl child is all the more deprived of education as compared to the male child. Discrimination is writ large amongst men and women as well as boys and girls in all fields. The present statistics are witness to this. The literacy rate among women is 54.28 percent and among girls is 39.42 percent.

Drinking water is a great problem in this country. Still, women in rural areas have to walk two kilometers or more with one or two pails

and with that load they have to walk back in scorching heat. Wells are drying up and the groundwater is slowly receding. In cities, since the problem is visible at points, the situation is horrible. Women have to fight for their turn to get water. In several towns, including cities, water is supplied on alternate days. Knowing fully well that the problem is acute, pressing and recurring, the governments do not take any initiative to solve it. On the other hand, plenty of water is available in bottles and sold at prices equal to milk.

Housing is another problem. Because of lack of work in rural areas, several thousands of people migrate daily to cities in search of work. They have to necessarily live on pavements or in crowded slums, or share the already insufficient accommodations with others. The 'Awas' programme has become inadequate and unable to cater to the needs of even a negligible percentage. Several social problems crop up due to such inadequate means of shelter. The poor are not allowed to stay even in small tin sheds, as the huts are periodically bulldozed in the name of beautification of cities. It is pitiable that the national shame of pavement dwelling instead of being wiped off, was screened out from the observation of Queen Elizabeth when she visited some parts of this country. A huge screen was erected throughout her route in a city and beggars were bundled into vans and shifted over very long distances, so that they may not return within a day or two and mob the roads again. Poverty and prostitution are on the increase.

It is very strange to observe that both famine and floods ravage this country. All seasons flourish regularly in succession, without fail, but their benefit is not available to all. This land is very rich with minerals and mines. Rare varieties of ores are available. Several varieties of vegetables and crops can be grown. Still the people are poor, unhealthy and miserable.. The percentage of people able to lead lives with minimum comforts is also slowly increasing. But these figures pale when compared with the devastating drudgery of the rural poor.

The plight of Scheduled Tribes who live in agency tracts and forests is more pitiable than their neighbouring rural poor. A recent study conducted by the UNDP reveals a sad state of affairs. The report says that the conditions of the Scheduled Tribes in India is worse than that of the sub-Saharan countries. In addition to lack of minimum facilities, these people face the problems of displacement. For the purpose of constructing huge dams or for mining operations, several thousands of

tribes are being displaced. They are forcibly taken out of their homes, their environment, their language, their culture and ultimately from their forest which give life and sustenance to them. Since independence, they are the ones to bear the worst brunt of industrialization. Civilization here means education, electricity, communication, hospitals and the like. According to the ICSSR Report of 1994, it was estimated that about 21.3 million people had been displaced between 1951 and 1990, to make way for mines, dams, industries and wild life sanctuaries. Around 30 percent of those displaced during 1950 and 1960, were estimated to have been resettled till 1980; and there was no noticeable improvement in the 1980s. A disproportionate percentage of the displaced were tribals and dalits. This was prior to the Sardar Sarovar Dam. Here, the displacement is frightening. The resettlement is highly disproportionate to the displacement. Agitation by tribals is still going on, not against the dam but for rehabilitation and relief.

Usha Ramanathan (1999) says the Hirakud Dam, when it was being built between 1948 and 1957, affected 285 villages. It appeared that due to displacement, the livelihood of 22,141 families consisting of 1,10,000 people was disrupted. Around 4,744 families, all belonging to Scheduled Castes and Scheduled Tribes, were displaced forcibly with the help of the police. Only 2,185 families were resettled in 17 rehabilitation camps. The same is going to happen with regard to Polavaram where a huge reservoir is planned on the river Godavari. For this reservoir, 11 revenue mandals will be submerged along with rich forest. More than 2,00,000 people are dreaded to be displaced and the State Government has no plan to rehabilitate such huge mass of people who will be forcibly lifted from their homes. Almost in all cases where huge dams are constructed, the displaced person are not rehabilitated. According to Nitya Jacob, "..the World Commission for Dams Report states that large dams whether built for irrigation, power, water supply or flood control, have failed in varying degrees to meet their goals on various fronts. They have adverse ecological impacts and governments have done little to ensure that the 80 million people displaced worldwide have been equally compensated. This is how many of the tribes are being displaced, but not rehabilitated but left as destitutes. When they are taken out of their forest abode and environment, they cannot adjust themselves to the situation in towns, being illiterate and innocent...." This is the plight of the tribes. The situation of dalits is not different. There is no considerable change in their social and economic situation. They remain landless in rural areas. More than half of the land which was assigned to them, is alienated in

spite of prohibitory laws. The administration has knowledge of these alienations and it was done with its connivance. The rich and influential exploit the poverty of the people and take away their land either by paying some paltry amount or by force, threats and deceit.

If that is the situation of the poor and downtrodden, the situation of small and marginal farmers is more pathetic. Because of various factors like the water scarcity, non-availability of fertilizers and the greed of middlemen, they are unable to obtainoptimal yield from their land. Still they cling to their small stretches. They put their heart and soul in it. The advent of the Special Economic Zones dealt a death blow to them. Their lands are compulsorily acquired by the government and sold to industrialists in the name of economic activity. Thousands and thousands of acres are thus being handed over to the industrialists. The formation of this Special Economic Zones is in direct conflict with Article 39(c) of the Constitution which says that "... the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment..."

The situation of the workers is equally pathetic. In the initial years of the republic, the public sector was introduced and encouraged with a dedication to develop the country. Slowly, it was made to suffer losses or incapacitation, by the greedy and corrupt managements and finally brought to a state of closure or put to sale at under-valuation. This was, to a large extent, with the discreet encouragement of the private sector. In the same fields, it is strange to observe the private sector flourishing. Some of the major public sector units which were considered to be the pride of the nation were rendered useless and burdensome. The working class in the private sector is at the mercy of the management under the 'hire and fire' American style. In public sector and State services, a new method of outsourcing has been introduced in order to avoid the obligation of providing employment to its citizens. The daily labouers working in unorganized construction sector are struggling to get bare minimum daily wages without any guarantee of work. They are compelled to gather at different points in the cities daily and offer their labour. Sometimes, they have to wait endlessly to be engaged. Both child labour and trafficking in human beings is on the rise, and has turned out to be a national shame. By listing out the woes of the people, it is not intended to convey that there has been no development at all since independence.The aim is to stress the point that there is no inclusive growth. A great majority of the people are not able to enjoy

the advantages of development and are denied the guarantees and protections under the Constitution.

Another growing feature is corruption in the administration. The prosecuting mechanisms fail to punish the guilty. Most of the offenders are not even brought before the courts. The corrupt officials are hand in glove with the investigating and prosecuting agencies. Several scams appear in media, but as days pass on, nobody knows what happened to them. One big scam swallows the other, and people forget the series of scams which ultimately end up with no result. Apart from investigating and prosecuting agencies, with their neck-deep corruption, the judiciary too is slowly joining the dark ranks. It is now publicly admitted that 20 percent of the higher judiciary is corrupt. There is no available estimation of how deep the lower judiciary has been flung into the morass of corruption. It appears there is no check on this deep fall. There is no mechanism to punish the corrupt in the higher judiciary.

The people are losing faith in the system. The people who are supposed to be the rulers of the country are reduced to a dismal state by their representatives and the appointed administrators. All initiatives are put to silence with strong arm tactics by the law enforcing agencies. The people who are armed with a vote to change a bad or corrupt government every five years, are made ineffective and powerless. They were made to accept that they are at the receiving end. Under the name of party democracy, a bunch of unaccepted candidates are thrust on the people. There is no choice. There is no alternative. They continue to remain at the stage of survival. The gap between the rich and the poor, the rulers and the ruled, management and workers, peasants and the agricultural labour, employers and employeeshas widened.

Maybe this is also due to the fatalistic philosophy of Hindu India, which has already eaten away the vitals of the country. The theory of 'Karma' has sapped not only energies but also the initiative. They blame the rulers, they fight against the administrators, they demand their due and in the end they remain resigned to their 'fate'. Instead of really going 'up in arms' they put down their arms in exhaustion. This is one side of the situation. A great section of the people revolt against the injustice and exploitation and prepare their brothers against the oppressive system but they are put down by the gun. The silent and peaceful agitator is not considered at all. He has to tire himself. The Gandhian method of hunger strike is reduced to mockery. The people can change the system.

But their poverty, illiteracy, dependence has reduced them to the stage of helplessness. That is why the rulers want to keep the masses illiterate and poor. The rulers enthusiastically distribute ration cards, rice or wheat at cheaper rates, old age pensions, mid-day meals, hundred days work and the like, but they never intend to make the people self-reliant. But this should not go on. It is not good for the country and democracy to keep millions of people hungry, illiterate and in ill-health.

It appears that this situation is likely to continue in the coming days too. To cap this, the political parties have started adopting foul methods to get into the Lok Sabha and the State Legislatures. As observed earlier, the number of crorepatis in the Lok Sabha is baffling. The total worth of the 543 members of the Lok Sabha, according to their own declaration is Rs. 28 billion. The assets of the cabinet are close to Rs. 5 billion. Out of 64 ministers, 47 are crorepatis. Each minister on an average is worth Rs. 75 million. In the Lok Sabha, the average worth of a member is Rs. 51 million. If such is the composition of the Lok Sabha and the Union Cabinet, what can be expected from them to better the conditions of the poor? The poor man is not in the agenda at all. To keep him alive till the next elections, the crorepati members and ministers formulate some schemes to dole out to him.

The paradox of Parliamentary democracy is reduced to that stage where the voter who is supreme, is found nowhere, after he clicks the button on the electronic voting machine, in the makeshift polling booth. Until that moment, the voter is a much sought after person. All political parties go to him, placate him and appease him. At least, he is available to the contesting candidates. But after the elections, the elected representatives are not available to the voters. It is almost an impossibility for a voter, if he is poor, to meet his member of Lok Sabha. The voter is not seen anywhere near the Lok Sabha or the Rashtrapati Bhavan or the Legislative Assembly, or near the Secretariat, the Supreme Court or any other power centre. Forget about a favour, but even to get a redressal for any injustice, it is next to impossible to approach a Member of Parliament or a Member of the Legislative Assembly.

All corridors of power are swarmed by rich people in search of means to exploit the available resources to the maximum. In the early days of the republic, people who were really interested in serving the people, especially the poor, were offering their candidature either to the Lok Sabha or Legislative Assembly. Slowly these Houses are being occupied

by businessmen, industrialists and criminals. The whole character of the House is being changed. The worst part is that in the last Lok Sabha, the government which was facing a no-confidence motion was bailed out by an industrialist. Some of the money offered by his agents to members of the Lok Sabha was displayed in the Lok Sabha itself. The country is at the mercy of industrialists. The industrialists have now grown to a stage where they are not only building their own great economic empires but also reaching positions of making and unmaking Chief Ministers in some States. At home, the native industrialists are dictating terms, running elections, managing results, forming Ministries and abroad, the World Bank and the IMF are deciding our policies. What to eat and what not to eat is being decided by foreign agencies. What to read, how to read, who should study in which institution is also being decided by such agencies. We are at the mercy of the United States of America, in building nuclear energy. In several such fields, the external agencies are deciding our priorities. Our policies are being designed elsewhere. India is capable of growing on its own, but it is made to obey and follow the dictates of external agencies. The independent nation is being subjugated to foreign powers. We are successfully preserving the caste system. The economic independence is being eroded slowly. The political independence is being threatened. It may be ravaged soon, if we allow things to continue to worsen.

In such a situation, the warning handed out by the Chief Architect of the Constitution, Dr. Ambedkar, on the eve of adoption of the Constitution in the Constituent Assembly, ringslike an alarm. Before the warning, he posed a question to the Constituent Assembly saying "... On 26th January, India will be an independent country. What would happen to her independence? Will she maintain her independence or will she lose it again? This is the first thought that comes to my mind. It is not that India was never an independent country. The point is that she once lost the independence she had. Will she lose it a second time" (CAD 1949-11-25, 11.165.318).

He posed another question by saying "... On the 26th January, 1950, India would be a democratic country in the sense that India from that day would have a government of the people, by the people and for the people. The same thought comes to my mind. What would happen to her democratic Constitution? Will she be able to maintain it or will she lose it again...?" (CAD 1949-11-25, 11.165.320). Reminding the

members that it is not that India did not know what is democracy, but it had lost it in the past; he asks will she lose it a second time?.

Finally, he said: "...On the 26th January, 1950, we are going to enter into a life of contradictions. In politics we will have equality and in social and economic life we will have inequality. In politics we will be recognizing the principles of one man and one vote and one vote one value. In our social and economic life, we shall, by reason of our social and economic structure continue to deny the principles of one man and one value. How long shall we continue to live this life of contradictions? If we continue to deny it for long, we will do so only by putting our political democracy in peril. We must remove this contradiction at the earliest possible moment or else those who suffer from inequality will blow up the structure of political democracy which this assembly has so laboriously built up" (CAD 1949-11-25, 11.165.325).

Dr. Ambedkar has shown a way to avoid the situation. He said "... If we wish to maintain democracy not merely in form, but also in fact, what must we do? The first thing in my judgment we must do is to hold fast to constitutional methods of achieving our social and economic objectives... When there was no way left for constitutional methods for achieving economic and social objectives, there was a great deal of justification for unconstitutional methods... If hereafter things go wrong, we will have nobody to blame except ourselves. There is a great danger of things going wrong. Times are fast changing... They are prepared to have government for the people and are indifferent whether it is Government of the people and by the people. If we wish to preserve the Constitution in which we have sought to enshrine the principles of government of the people, for the people and by the people, let us resolve not to be tardy in the recognition of the evils that lie across our path and which induce people to prefer Government for the people to Government by the people, nor to be weak in our initiative to remove them. That is the only way to serve the country...."

We can only ignore those prophetic words at our peril. Insisting on adherence to constitutional method and governance in accordance with the constitution is treated as an offence. Demanding human dignity is considered as an act of treason. This attitude is an indication of the minds of those who want to subvert the Constitution. We can no more ignore the Directive Principles of the Constitution. Making the Constitution work is after all in the hands of the people. They will ultimately decide

whether the Constitution is to be implemented. The caste system has ruined our social independence. Economic imperialism is thwarting our economic independence. These two combined are threatening our political independence. Surrendering their independence to the above two monsters, the peoples' representatives are mutilating the Constitution. Everything contained in the Constitution may not be good, but certainly several good things are embedded in the Constitution. Only vigilant people, anointed and surcharged with the ever-glowing trinity of ideals—liberty, equality and fraternity, can save the Constitution. Saving the Constitution is saving democracy.

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IN QUEST OF EQUALITY:
INDIAN CONSTITUTION SINCE INDEPENDENCE

The Constitution of India opens with the words "We the people of India". In the name of the people, on behalf of the people, it has been made, drafted, approved and adopted. They have solemnly resolved to constitute India into a Sovereign Socialist Secular Democratic Republic. They had also pledged to secure to all its Citizens, Justice, Liberty, Equality and Fraternity. They gave the constitution unto themselves and it is being passed on from generation to generation. The people expected that the India will be a Welfare State securing for all its citizens the Fundamental Rights including the right to life with human dignity, free from poverty and hunger. They have meticulously laid out the path for developing this land into a democratic country with the help of the Directive Principles.

Like the flow of the Ganges, the mighty river more ancient than the inhabitants of the land, the people are by and large calm and quiet, sometimes restless, suddenly becoming virulent and violent, slashing the banks and swarming into the sea of humanity with all their aspirations and resolutions afloat. If one looks at them, one is perplexed to locate, where are we the people? Are they swirling in the current or are stuck in an undercurrent? Drowning under overreaching waves? Washed away by furious floods? Or what? One thing is certain, no wave, no flood, no storm, no holocaust, could so far quell the indomitable spirit of the people. In all adversities, the people survive, struggle and continue their journey carrying on their unfinished tasks and unfulfilled dreams.

~ Bojja Tharakam

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